



Court of Appeal
Supreme Court
Sydney

Decisions of Interest

8 May 2023 – 21 May 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

Civil Procedure: representative proceedings

Augusta Pool 1 UK Ltd v Williamson [\[2023\] NSWCA 93](#)

Decision date: 12 May 2023

Bell CJ, Ward P and Adamson JA

The first and second respondents commenced representative proceedings in the Supreme Court against the former owner, as well as the builder and the structural engineer, of a residential building on behalf of owners of the units. The prosecution of the class action was funded by Augusta. The litigation funding agreements provided that Augusta's commission would be the greater of either 12.5% of any compensation received or 2.6 times the funds deployed by Augusta. In May 2022, the parties entered into an agreement to settle the class action subject to Court approval under s 173 of the *Civil Procedure Act 2005* (NSW). Augusta reduced its commission from around 50% to 36.4% of the gross settlement sum. In July 2022, a settlement notice was distributed to group members, informing them that the commission was calculated as 2.6 times the share of the project costs but that the litigation funder had agreed to reduce this to 2.3 and that a payment for deferred adverse cost insurance would be deducted from the settlement sum. No objection was received, and a settlement and release deed was executed in October 2022. The respondents sought an order under s 173 of the CPA approving that settlement. The primary judge found that, to achieve a fair and reasonable settlement, the total deduction represented by the funder's commission and the adverse costs insurance should be reduced to 25% of the gross settlement amount. Augusta appealed that decision.

Held: dismissing the appeal

- The power vested in the court under s 173 is a discretionary one to which the *House v The King* standard of appellate review applies. The section permits some latitude as to the orders to be made: [1]-[9], [77]-[78].
- The primary judge did not proceed on the basis that there was a legal onus of any kind on the applicant; rather, the primary judge focused on whether the evidence was sufficient to conclude that the proposed settlement was fair and reasonable in the interests of the group members. The primary judge considered it relevant to take matters such as the return on the funder's investment into account: [100]. One matter properly able to be taken into account in assessing whether a proposed settlement is fair and reasonable is whether a litigation funder is receiving a reasonable rate of return: [102].
- The primary judge was aware of the distinction between common fund orders and funding equalisation orders and did not misapprehend the nature of any cases in which a 25% funder's commission was considered reasonable. It cannot be said that the reasonableness of the funder's commission was an irrelevant consideration when assessing whether the settlement was fair and reasonable in the interests of the group members: [120]. The main reason the primary judge adopted the 25% figure was the disclosure that typical funding arrangements were for "about 30%" commission; and his conclusion that a higher deduction from the gross settlement sum was not justified as an objectively reasonable rate of return on Augusta's investment: [121].
- The group members were not told explicitly the effect the adverse cost insurance would have on the overall percentage of the settlement sum that would be paid to the litigation funder, and this undermined the weight that could be placed on group members' failure to object to those deductions: [142]-[147].

Administrative Law: certiorari; Contracts: declaration

Secretary, Department of Education v Derikuca [\[2023\] NSWCA 94](#)

Decision date: 12 May 2023

Kirk JA and Simpson and Basten AJJA

Mr Derikuca was employed as a cleaner by a company ("ISS") which has a "whole of government" cleaning contract with Property NSW, a statutory body corporate. Mr Derikuca had been working at a public school in Sydney when a complaint was made about him. ISS terminated his employment. Mr Derikuca commenced proceedings in the Supreme Court against the Department of Education, challenging two "decisions". The first was an email sent by a person in the Department to ISS indicating the Department "would appreciate if action is taken to ensure that Mr Derikuca is not employed on any [Department] facilities". The second was placing Mr Derikuca's name on the Department's "Not To Be Employed List". Mr Derikuca also claimed "compensation". The primary judge made a declaration that the Department had no power under the contract to exclude the respondent from school sites. The primary judge granted certiorari quashing the second decision because the act of listing lacked statutory authority and s 7E of the *Education (School Administrative and Support Staff) Act 1987* (NSW) and s 7(1) of the *Teaching Service Act 1980* (NSW) required that the listed person be, or have been, an employee of the Department. His Honour directed, relevantly, that the parties each file and serve submissions on a potential claim for damages identified by the primary judge but not raised by either party. The Department appealed those decisions.

Held: granting leave to appeal and allowing the appeal

- Regarding the second decision, the primary judge premised his decision on the fact that the exclusion of the respondent from departmental sites was not authorised by the two statutory powers invoked by the applicant. The only statutory consequence of being placed on the list is that the person is placed on the list. Any further consequences is the result of the exercise of other powers, which are not appropriately addressed by quashing a decision to put someone on the list: [49]. No argument of text, context or purpose supports the conclusion that the two statutory powers are limited to persons who were currently working, or had previously worked, in the Department: [60].
- Regarding the first "decision", the requests were not definitive and did not invoke any particular powers, and it was difficult to regard them as a "decision": [70]. The declaration did not address the power of the Secretary to end the employment contract between ISS and the respondent, but whether the Secretary could exercise a power under the ISS-Property NSW contract. Further, ISS was not a party to the proceedings, and a court would be slow to make a declaration about the effect of a contract involving persons not before the court in the absence of good reason to do so: [77]-[81].
- Regarding the directions made for further submissions, it is not uncommon for courts to give parties an opportunity to be heard in relation to what final relief should be granted: [90]. Section 63 of the *Supreme Court Act 1970* (NSW) confers on the Court broad power to resolve all issues in a controversy. However, there is a difference between resolving the controversy brought before the Court and instigating further disputes: [93]. The primary judge identified a whole new potential claim based on the tort of inducing breach of contract, which had not been raised by Mr Derikuca: [100]. This went beyond the kind of assistance which a court ought to provide a litigant in person: [101].

Negligence: assessment of damages

Chen by her tutor Huang v Kmart Australia Ltd [2023] NSWCA 96

Decision date: 16 May 2023

White JA, Griffiths AJA and Weinstein J

On 8 January 2020, Miss Chen, who was six years old, was injured while shopping with a family member at a store operated by Kmart. The injury was a laceration to Miss Chen's right eyelid, following a collision with a clothing rack. Miss Chen underwent remedial ophthalmic surgeries: one on the day of the accident, the other some months later. Kmart did not dispute that Miss Chen's injury had been caused by the negligence of its employees. By her tutor, Miss Chen commenced proceedings against Kmart in the District Court in September 2021, claiming damages for: non-economic loss, resulting from the physical and emotional trauma of the injury and surgeries; and for future economic loss in the form of loss of earning capacity, potentially resulting from her physical injury and its possible psychological sequelae. Miss Chen did not suffer any impairment of her vision, but suffered mild facial scarring and a slight droop in her right eye. Expert psychiatric evidence alternated on whether she had developed an adjustment disorder or somatic symptom disorder from the injury. The primary judge awarded \$45,825 for non-economic loss and a buffer sum of \$5,000 for future lost earning capacity. Miss Chen appealed that decision, claiming that those components were insufficient. Kmart cross-claimed on the basis that no sum should have been awarded for loss of earning capacity, where the evidence did not establish that Miss Chen would suffer a diminution in earning capacity.

Held: granting leave to appeal but dismissing the appeal; refusing leave to cross-appeal

- Where a party seeks to challenge an award of damages for non-economic loss, determined in accordance with s 16 of the *Civil Liability Act 2002* (NSW), that party must demonstrate a *House v The King* (1936) 55 CLR 499 error: [12]. As the primary judge had regard to the matters which Miss Chen alleged were overlooked and factored those matters into the award for non-economic loss, no such error had been identified: [13]-[17].
- Assessing lost earning capacity caused by personal injury in the case of a very young child is an exercise in intuition, and no reasoned explanation generally can be given why a particular figure fairly reflects the loss suffered. The primary judge's assessment of the possibilities that might affect the applicant's earning capacity, including development of social inhibition and rejection from others in the workplace, based in part on the expert psychiatric evidence, must be understood with this in mind. While the buffer sum was low, it was not so low as to fall outside the reasonable range open to the primary judge: [20]-[37], [42]-[51].
- Miss Chen established that the negligent infliction of injury had reduced her earning capacity for some occupations. Damages for future economic loss in the form of lost earning capacity may be awarded where a claimant establishes that the injury suffered will or may produce financial loss, having regard to the possibilities of loss eventuating (s 13 of the *Civil Liability Act 2002* (NSW)): [38]-[41].

Contracts: construction; Commerce: restraint of trade

DXC Eclipse Pty Ltd v Wildsmith [\[2023\] NSWCA 98](#)

Decision date: 16 May 2023

Bell CJ, Brereton JA and Simpson AJA

DXC Eclipse, a Microsoft business software solutions company, supplied a Microsoft product called “NAV”. In 2018, it acquired a company called Sable37, which specialised in the supply of a more advanced Microsoft product “AX” and another product called “Dynamics 365 Customer Engagement”. The acquisition was by a Securities Purchase Agreement (SPA) entered into with a number of “sellers”, including Mr Wildsmith, who was Sable37’s “Global Managing Director” . The SPA obliged Mr Wildsmith to remain with DXC Eclipse for at least one year following the acquisition. Mr Wildsmith stayed for more than three years. The SPA also contained various restraints. The non-competition restraint prevented the “sellers” from operating a “Competing Business” in the Restraint Area during the Restraint Period. “Business” was defined as “the business of the Sable37 Group as a whole as at the Completion Date ... based upon Microsoft Dynamics 365 technologies (and future, successor or derivative Microsoft Dynamics 365 products, services and technologies) ...”. In 2021, Mr Wildsmith incorporated Will Thirty Three which supplied services based on “BC”, a cloud-based version of AX. He was also appointed to the board of another company, Sentient, which supplemented the services offered by Will Thirty Three. DXC Eclipse commenced proceedings in the Supreme Court, alleging that Mr Wildsmith’s new venture breached the noncompetition and non-solicitation restraints in the SPA. The primary judge found that there was no breach of the non-competition restraint and that, even if there was, the non-competition and non-solicitation restraints were unreasonable in scope and were unenforceable. DXC Eclipse appealed that decision.

Held: dismissing the appeal

- The appeal should be determined on the basis that it was fought at first instance, namely that DXC Eclipse bore the onus, under s 4(1) of the *Restraints of Trade Act 1976* (NSW), of establishing the reasonableness of the restraints it sought to enforce: [60]-[62].
- The respondents were not in breach of the non-competition restraint because BC was not a “future, successor or derivative” product of Microsoft Dynamics 365 as used in the “Business” (as defined in the SPA) of Sable37 at the SPA’s Completion Date: [111]. The word “future” should be construed as referring to “successor” or “derivative” products which may emerge in the future: [108]-[109]. Some degree of connection was required between the “future” product and the products used by Sable37 at the Completion Date.
- Where the level of competition between a vendor and a purchaser of a business is slight, the greater the scope of a non-competition restraint, the less it is likely to be reasonable. The non-competition restraint was unreasonable in scope: [136]. There was no suggestion that Microsoft’s dealings with Will Thirty Three would have any effect on Microsoft’s relationship with DXC Eclipse, making injunctive relief unnecessary to protect the goodwill purchased when Sable37 was acquired: [146]-[150]. The Acknowledgement in cl 16.4 of the SPA that the restraints were reasonable could not support a determination that the non-competition restraint was reasonable in duration: [154]-[156]. The Appellant failed to demonstrate that a restraint period of seven years was necessary to maintain the goodwill the Appellant acquired: [157]-[158].
- Even if the primary judge had erred, the Court’s discretion on a rehearing under s 75A of the *Supreme Court Act 1970* (NSW) would not have been exercised to grant the injunctive relief sought: [150], [164]. The reasonableness of the restraints was to be assessed at the time the SPA was entered into but the discretion whether to enforce the restraints could be informed by considerations at the time enforcement was sought: [162]-[163].

Australian Intermediate Appellate Decisions of Interest

Statutory Construction

Chief Executive Officer, Department of Water and Environmental Regulation v Waroona Resources Pty Ltd [2023] WASCA 73

Decision date: 18 May 2023

Buss P, Mitchell and Vaughan JJA

The respondent is the registered proprietor of a Premises and a Licence issued under pt V div 3 of the *Environmental Protection Act 1986* (WA) which allows the respondent to undertake the activities of landfilling, waste processing and crushing and screening of building material at the Premises. The Premises was a licensed landfill for the purposes of the Waste Avoidance and Resource Recovery Levy Regulations 2008 (WA). Reg 5(1)(i) of the Levy Regulations imposes a levy for waste disposed of at a landfill. Under the Department of Water and Environment Regulation, the respondent's Premises was exempted from paying the levy over asbestos-containing material for the period of 1 July 2019 to 30 June 2020 (Exemption Period). Reg 5(1A) defined asbestos-containing material as "any manufactured material or thing that, as part of its design, contains asbestos". The respondent lodged three returns with the Department during the Exemption Period which claimed asbestos-containing material mixed with sand or soil was exempt from the waste levy. The respondent contended that it was not reasonably practicable to separate the asbestos-containing material from the mixture. In November 2021, the Director General of the Department wrote to the respondent, rejecting the respondent's claim that the whole volume of the mixture was exempt from the payment of waste levy. The respondent commenced proceedings in the Supreme Court, asking whether reg 5(1)(i) of the *Waste Avoidance and Resource Recovery Levy Regulations 2008* (WA) applies to the whole volume of a mixture comprising "asbestos containing material which is not reasonably practicable to separate from other material in the mixture; or only the component of the mixture which is "asbestos containing material". The primary judge found that the exemption applied to the whole volume of the mixture. The Department appealed that decision.

Held: allowing the appeal

- The three aspects of the regulation which support the construction that reg 5(1)(i) applies to the whole volume of the mixture are: first, the reference to reg 44(a) of the *Controlled Waste Regulations* which contemplates that it may not be reasonably practicable to separate asbestos-containing material from a mixture of waste; secondly, the Levy Regulations do not set out a mechanism for determining the volume of asbestos-containing material; and thirdly, the purpose of the legislative scheme and of exempting asbestos-containing material from the waste levy: [20]-[24].
- However, given that the primary object of statutory construction is to construe the relevant provision consistently with the language and purpose of all the provisions of the statute; that the primary judge's approach requires words to be read into the provision; and that the three conditions required for reading words into a provision (*Taylor v The Owners - Strata Plan No 11564* [2014] HCA 9) are not satisfied, the preferable construction is that only asbestos-containing material as defined in reg 5(1A) is exempt from the waste levy under reg 5(1)(i): that is, the material must *as part of its design* contain asbestos; waste mixed with asbestos-containing material does not meet that definition. On the facts, the levy exemption was available only for the estimated volume of asbestos-containing material within the mixture: [30], [36]-[37], [41], [47].

Administrative Law; First Nations People

***Kelaray Pty Ltd v Dare & Ors* [2023] SASCA 46**

Decision date: 11 May 2023

Livesey P, Doyle and Bleby JJ

In 2020, Kelaray applied for an authorisation under s 23 of the *Aboriginal Heritage Act 1988* (SA) (“AHA”) in anticipation of a mineral exploration program that it proposed to undertake. The Minister embarked upon a consultation program under s 13 of the AHA and provided a consultation package to consultees including the first, second and third respondents. The third respondent opposed the grant of an authorisation. On 29 December 2020, the Minister authorised the appellant and its employees, agents or assignees to act in a manner that would otherwise contravene s 23 of the AHA (the Authorisation). The Authorisation was subject to six conditions imposed under s 14 of the AHA, as well as several non-binding “expectations”. The respondents brought an application for judicial review in the Supreme Court of South Australia. The primary judge upheld the review, finding that: the Minister misdirected himself and/or acted ultra vires by relying on the Kelaray’s own procedure’s for protecting Aboriginal sites, objects and remains; and the Authorisation granted by the Minister was inconsistent with s 20 because it detracted from that section’s practical legal operation, which was land occupiers to notify all discoveries of Aboriginal sites, objects or remains . Kelaray appealed that decision.

Held: allowing the appeal

- The Authorisation was not beyond the Minister’s power: [106]-[109]. The scope of the proposed authorisation to impair the protection of Aboriginal heritage otherwise provided for by the provisions of the AHA was an implied mandatory relevant consideration under ss 23 and 14: [98]-[99]. However, the primary judge erred in holding that it was beyond the Minister’s power to grant an authorisation under s 23 where it would operate inconsistently with, or substantially impair the protection otherwise afforded by ss 20 and 24 of the AHA because there is no express basis for this limitation and there is no basis for implying this limitation in the context, scope or purpose of s 23: [100]-[102], [105].
- Kelaray’s internal procedures, separate from the conditions attached to the Authorisation, provide reasonable protection for Aboriginal heritage when compared with the protection otherwise afforded by the combination of ss 20 and 24,: [112], [122], [128]. Therefore, the internal procedures combined with the conditions attached to the Authorisation, mean that the Authorisation did not impair the practical legal operation of ss 20 and 24: [129].
- The Minister did not fail to consider the mandatory consideration described above, evident in Condition 3 in the Authorisation: [133]. The Minister’s decision was not invalid by reason of inadequate attempts to address the capacity of the Authorisation to reduce the protection afforded to chance finds as his reasons make it plain his decision was the product of balancing the competing interests contemplated by the AHA: [139]-[140].
- A blanket s 23 authorisation for interference with undiscovered heritage is not fundamentally inconsistent with the protection of Aboriginal heritage, nor was it legally unreasonable for the Minister to grant such an authorisation: [159]-[163]. The Authorisation, but not all of the Conditions, was granted in terms that would extend to successors in title to Kelaray’s rights over the Application area: [164]-[165]. There were no complications that might arise from the assignment of Kelaray’s interest that were sufficient to render the Authorisation either beyond power or legally unreasonable: [176]-[178]. The Minister’s inclusion of various “expectations”, in his covering letter to Kelaray notifying it of its authorisation under s 23 of the AHA, did not indicate that the Minister lost sight of the distinction between the conditions and expectations: [192]-[193]. Likewise, it was not legally unreasonable to grant the Authorisation without including the third and fourth expectations as conditions: [199].

International Decision of Interest

Dismissal; Defamation; Public Interest

Hansman v. Neufeld [\[2023\] SCC 14](#)

Decision date: 19 March 2023

Court: Supreme Court of Canada

Wagner CJ, Karakatsanis, Côté, Rowe, Martin, Jamal and O'Bonsawin JJ

In 2016, British Columbia's Ministry of Education launched "Sexual Orientation and Gender Identity 123" which sought to foster inclusion for students who may face discrimination in school because of their gender identity or expression. Mr Neufeld, a public school board trustee, publicly criticised the initiative online. Mr Hansman, a gay man, teacher and former president of the British Columbia Teachers' Federation, publicly denounced Mr Neufeld's views, accusing him of undermining safety and inclusivity for transgender and 2SLGBTQ+ students in schools ("2S" stands for "two-spirit"). Mr Neufeld sued Mr Hansman for defamation. Mr Hansman applied to have the action dismissed as a strategic lawsuit against public participation ("SLAPP") under s 4 of British Columbia's *Protection of Public Participation Act* ("PPPA"). The first instance judge dismissed the action, finding that it had the effect of suppressing debate on matters of public interest. The Court of Appeal for British Columbia reinstated the action. Mr Hansman appealed that decision.

Held: allowing the appeal

- The Court's interpretation of s 137.1 of the *Ontario's Courts of Justice Act* applies with equal force to s 4 of the PPPA: [52]. The weighing exercise prescribed by s 4(2)(b) requires that the harm to the plaintiff be serious enough to outweigh the public interest in protecting the defendant's expression: [59]. While the presumption of damages can establish the existence of harm, it cannot establish that the harm was serious: [67]. The chambers judge did not err in concluding that Neufeld had adduced almost no evidence of damage suffered because of Hansman's statements: [72]. The Court of Appeal erred in factoring in to the weighing exercise a chilling effect that would apparently from a plaintiff's inability to pursue a defamation claim: [74]-[78].
- The subject matter of Hansman's speech, the form in which it was expressed, and the motivation behind it were all deserving of significant protection: [91], [93]. Neufeld failed to adequately challenge the fair comment defence under s 4(2)(a)(ii) of the PPPA because: Neufeld's original online post could provide the requisite factual basis for most statements in issue and Neufeld's statements had likely achieved a level of notoriety such that they would have been known to the reader; Hansman's statements were an expression of Hansman's beliefs based on his own interpretation of Neufeld's statements; and malice was not found as Hansman honestly believed the views he espoused, and he was entitled to do so: [102]-[103], [112]-[114], [118]-[119].

Patents: enablement requirement

Amgen Inc v. Sanofi [\[2023\] USSC 598](#)

Decision date: 18 May 2023

Court: United States Supreme Court

Roberts CJ, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett, Jackson JJ

To treat patients with high low-density lipoprotein (LDL) cholesterol (which can cause heart disease, heart attacks and strokes), antibodies may be used to inhibit PCSK9 (a naturally occurring protein that binds to and degrades LDL receptors responsible for extracting LDL cholesterol from the bloodstream). Amgen and Sanofi both developed a PCSK9-inhibiting drug. In 2011, Amgen and Sanofi both obtained a patent for the antibody employed in their respective drugs. Each patent describes the relevant antibody by its unique amino acid sequence. In 2014, Amgen obtained patents purporting to claim “the entire genus” of antibodies that “bind to specific amino acid residues on PCSK9,” and “block PCSK9 from binding to [LDL receptors]”. Amgen identified the amino acid sequences of 26 antibodies within the genus, then described two methods (“the roadmap” and “conservative substitution”) that could be used to make other antibodies within the claimed genus. Amgen sued Sanofi for infringement. Sanofi claimed that Amgen’s claims were invalid under the Patent Act’s “enablement” requirement. The district court found in favour of Sanofi. The Court of Appeals for the Federal Circuit dismissed an appeal from that decision. Amgen appealed that decision.

Held: dismissing the appeal

- The “enablement requirement” requires patents to specify how to make and use an invention. However, it is not always necessary to describe with particularity how to make and use every single embodiment within a claimed class, provided that the specification discloses “some general quality...running through” the class that gives it “a peculiar fitness for the particular purpose” (*Incandescent Lamp Patent*, 159 U. S. 465). Nor is a specification necessarily inadequate just because it leaves the skilled artist to engage in some measure of adaptation or testing (*Wood v. Underhill*, 5 How. 1). A specification may call for a reasonable amount of experimentation to make and use a claimed invention, and reasonableness in any case will depend on the nature of the invention and the underlying art (*Minerals Separation, Ltd. v. Hyde*, 242 U. S. 261): Pp. 13-15.
- Amgen’s patent failed to satisfy the enablement requirement, , even allowing for a reasonable degree of experimentation: Pp. 15. Amgen sought to monopolise an entire class of things defined by their function (every antibody that both binds to particular areas of the sweet spot of PCSK9 and blocks PCSK9 from binding to LDL receptors), including a vast number of antibodies that Amgen has not described by their amino acid sequences. Amgen insisted that its claims were enabled because scientists can make and use every functional antibody if they follow the described methods. However, the “roadmap” merely described step-by-step Amgen’s own trial-and-error method for finding functional antibodies and “conservative substitution” requires scientists to make substitutions to the amino acid sequences of antibodies known to work and then test the resulting antibodies to see if they do too: Pp. 16-17. The Federal Circuit did not conflate the question of whether an invention is enabled with how long it may take a person skilled in the art to make every embodiment within a broad claim. The enablement mandate is designed to achieve a balance between incentivizing inventors and ensuring the public receives the full benefit of their innovations. In this case, the Court’s duty was to enforce the enablement requirement. Pp. 18–19.