Court of Appeal
Supreme Court
Sydney

Decisions of Interest

22 May 2023 – 4 June 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

Taxes and Duties: vesting orders; dutiable transactions

Chief Commissioner of State Revenue v Shell Energy Operations No 2 Pty Ltd **[2023] NSWCA 113**

Decision date: 26 May 2023

Kirk and Adamson JJA and Griffiths AJA

In 2014, Green State Power Energy Pty Ltd (GSP), acquired interests in three power stations under a NSW privatisation process. In 2018, Shell Energy acquired all of the shares in GSP. The Commission determined that this was a "relevant acquisition" under s 149 of the *Duties Act 1997* (NSW) and therefore dutiable. The Commissioner found that GSP was a "landholder" under Ch 4 of the *Duties Act* because it held property interests in the items constituting the power stations, which items were fixtures and thus part of the land. Shell Energy commenced proceedings in the Supreme Court seeking a review under s 97(1)(a) of the *Taxation Administration Act 1996* (NSW). It submitted that the property interests in the items constituting the power stations had legally been severed from the land by two vesting orders made under the *Electricity Generator Assets (Authorised Transactions) Act 2012* (NSW) (the EGA Act). The first vesting order was made in 2013, and vested interests in the items constituting the power stations in a State-owned corporation (Green State Power). A second vesting order in 2014 vested those interests in GSP as part of a sale process. The primary judge found in favour of Shell Energy. The Commissioner appealed that decision.

Held: allowing the appeal

- The primary judge correctly concluded that the vesting orders transferred ownership of the items and legally severed the interests in the items constituting the power stations: [78], [83]. The land on which the power stations were situated was owned by the Water Administration Ministerial Corporation (WAMC). The provision of the EGA Act relied on by the Treasurer in making the vesting orders did not extend to the transfer of assets of WAMC, but the broader grants of power under the Act supported the vesting orders: [41]-[45]. The 2013 vesting order, on its face, only vested the interests which another State entity, Eraring Energy, had in the power stations, and not the interests of WAMC: [61]-[62]. However, a critical feature of privatisation is to be very clear about what assets are being sold: [72]. The vesting orders were meant to achieve a practical end being to gather assets for sale in a new company, and to achieve the highest possible sale price for the State: [77].

- The items constituting the power stations had the legal character of goods before being incorporated into the power stations and affixed to the land. At general law, the effect of the legal severance was that the items resumed their previous legal character as chattels. The Duties Act does not alter this conclusion: [97], [112]-[114]. Subject to some express exclusions, the Duties Act employs the term "goods" as understood at general law: [116], [120]. But, crucially, the object of s 155 is to tax both land *and* goods. Even if the interests in the power stations were innominate sui generis property interests, then where the legislature sought to encompass both one end of the spectrum and the other, it is difficult to see why something in between the two ends of the spectrum should evade being liable to duty: [125].

- The primary judge did not err in considering whether the leases were a "driver of value". Both the parties' experts agreed that, where valuation by reference to market rent was not possible and where there were two assets in a business whose value could not be determined, then whether an asset was the "driver" of value, could be relevant to the valuation process: [140]. The primary judge did not err in finding that the water agreements, and not the bare land leases, were drivers of value as the primary judge did not mistake the facts in the *House v The King* sense in determining this question of fact and degree: [149].

Building and Constructions: contract; implied terms; statutory warranties

Owners SP 92450 v JKN Para 1 Pty Limited **[2023] NSWCA 114**

Decision date: 26 May 2023

Gleeson, White and Brereton JJA

The second respondent, Toplace, designed and constructed a building under an agreement with the developer, JKN. The building was constructed using aluminium composite panels (ACPs) as the external cladding. In 2016, Fire and Rescue NSW determined that the cladding was not adequately fire resistant, and recommended that it be rectified and the façade be certified compliant. In 2016, the common property vested in the Owners Corporation. The final occupation certificate was issued in 2017. The Owners Corporation alleged that by installing the ACPs, the respondents had breached the warranties in s 18(1)(b), (c) and (e) of the *Home Building Act 1989* (NSW) (HBA) and commenced proceedings in the Supreme Court seeking rectification damages for the cost of replacing the cladding. The reference to "any other law" in s 18B(1)(c) incorporated the requirements of the Building Code of Australia (BCA) as at 5 July 2013, which required the external walls of the building to be "non-combustible". Compliance with this requirement of the BCA could be achieved through the "deemed-to-satisfy" provisions of the BCA or through an "alternative solution". The primary judge found no breach of the s 18(1)(c) warranty and declined to award reinstatement damages on the basis that, although the "deemed-to-satisfy" test was not satisfied, the Owners Corporation had failed to establish that an alternative solution "could not then or now be performed". His Honour found that no breach of s 18(1)(b) and (e) had been established because the evidence did not show that the cladding was combustible for the purposes of the BCA, or in a general sense. The applicant appealed that decision and the respondents conceded a breach of s 18(1)(c).

Held: allowing the appeal

- The respondents had breached s 18B(1)(c) because the building did not satisfy the fire resistance requirements of the BCA. The external cladding did not comply with the deemed-to-satisfy provisions and no alternative solution was prepared before the issue of the construction certificate: [63]–[66].

- The burden of proof for establishing loss lies on the claimant, however, the party in breach of contract has an evidentiary onus of displacing the prima facie rule that damages are the cost of reinstatement. That party may do so by showing that reinstatement would be unreasonable: [71]–[79]. Once it established the respondents had breached the BCA, the Owners Corporation was not required to prove the respondents could not have complied with the BCA by offering a hypothetical alternative solution. Since the respondents failed to prove an alternative solution would have been available, they did not discharge their evidentiary onus of establishing that the costs of rectification would be unreasonable: [80]–[83].

- The respondents' failure to prepare a solution alternative to the cladding was not merely a formal or technical breach not warranting reinstatement damages. By installing cladding which did not comply with the performance requirements of the BCA with respect to fire resistance, the respondents provided the Owners Corporation with a building below the minimum standards for public safety, which they were contractually obliged to provide: [102]–[110].

Civil Procedure; Companies; Equity: laches

***Macquarie Units Pty Ltd v Sunchen Pty Ltd* [2023] NSWCA 116**

Decision date: 26 May 2023

Meagher, White and Brereton JJA

The first appellant owned shares in the third respondent company, which was a vehicle used by the first appellant and first respondent to acquire management and letting rights businesses in relation to resorts in North Queensland. On 21 October 2014, those shares were transferred to the first respondent without the first appellant's authority or consent and the first respondent became registered owner of the shares. The company operated the businesses and purchased two development properties. Four years after the transfer, the appellants commenced proceedings in the Supreme Court, seeking rectification of the third respondent's share register, and alternatively equitable compensation for loss of the value of the shares at the time of the hearing. They also claimed damages for wrongful transfer of the shares. The primary judge dismissed the appellants' claims, finding that the claim to equitable compensation was barred by laches and that the claim to damages failed because the appellants had not proved they had suffered any loss. The appellants appealed that decision.

Held: dismissing the appeal

- Equitable relief may be refused on the ground of laches if the plaintiff's delay in bringing proceedings has created a situation which, if disturbed by litigation, would create injustice or prejudice to the defendant: [80]-[84]. There is "delay" if a diligent plaintiff sufficiently apprised of the facts and their rights would have commenced proceedings at some earlier stage. The appellants knew about the unauthorised transfer on the day it occurred and waited four years to bring proceedings: [85]-[86], [118]. Relevant to the question of "prejudice" is the nature of the claim and whether it involves the acquisition of a specific asset or a business that is then operated. In such cases, equity is less tolerant of delay because of the prejudice which is likely to result: [89]-[99], [104]-[105]. It would unfairly prejudice the respondents if the appellants were allowed to stand by and permit the respondents to make a substantial capital gain due to their own exertions and exposure to risk, and now claim an entitlement to a share in that gain where they had made no contribution to the acquisitions and developments: [100]-[103], [105]-[108], [118]-[119].
- The appellants' claim to equitable compensation for the value of the shares measured at the time of the hearing was correctly found by the primary judge to be barred by laches because the current value of the shares reflected the respondents' management of the businesses and development of the properties over the four years: [64]-[65], [72]. On the contract claim, the primary judge did not err in finding that the appellants had failed to discharge their onus of proving some loss measured at the time of the transfer. The assets of the third respondent at that time were the three resort businesses, the purchase of which had been wholly funded by borrowings. The primary judge found the purchase price reflected the fair market value of those assets, following an open selling campaign. Thus the third respondent's net value at the date of transfer (and the value of the transferred shares) was no more than nil: [58], [77]-[78], [119]-[120].

Contracts: construction and interpretation

The J & P Marlow (No 2) Pty Ltd v Joseph Hayes & Andrew McCabe in their capacity as joint and several liquidators of Peak Invest Pty Ltd (in liq), Five Islands Invest Pty Ltd (in liq), Surry Hills Pub Invest Pty Ltd (in liquidation) and Four By Four Investments Pty Ltd (in liq) **[2023] NSWCA 117**

Decision date: 26 May 2023

Bell CJ, Meagher and Kirk JJA

The First and Second Appellants (the Marlow Group) entered into four hotel management agreements entitling them to a Capital Gains Bonus Fee (CGBF) upon the sale of four hotels. The hotels are on land which was owned by four companies (the Second to Fifth Respondents, "the Landowners") who are now in liquidation. The hotels were operated by separate companies, all of which are under administration ("the Company"). In 2022, the land was sold with the hotels and the 2021 HM Agreements appointed the Marlow Group as the "Hotel Manager" and entitled it to certain fees, including a CGBF calculated in accordance with Item 3 of Sch 2 (15% of the "Net Sales Price" of the Property, less the "Purchase Price" and "Net Capital Expenditure"). In the winding up of the Landowners, the Marlow Group claimed to be entitled to a CGBF calculated on the basis that the "sale price of the Property" encompassed the sale price of the land and the hotel businesses. In the Supreme Court, the liquidators (the first respondent) sought a declaration about the proper construction of the CGBF formula. The primary judge found that sale price of the "Property" in the definition of the term "Net Sales Price" in item 3 of Sch 2 meant the sale price of the land and building, but not of the hotel business and that the "Business" included the hotel business encompassed by the definition of "Hotel". The appellants appealed that decision.

Held: dismissing the appeal

- Each company's leasehold interest in the hotels were outside the definition of "Property" in the 2021 HM Agreements: [57]-[58]. The requirement in cl 5.3 that "the Property and the Hotel" be sold "as one package and as a going concern" did not require that the "sale price of the Property" encompass the hotels' cashflow. Moreover, the goodwill of the Hotel did not fall within the definition of "Property": [63]-[64]. Under cl 14.1(e) of the 2021 HM Agreements, the Hotel Manager was entitled to a CGBF "calculated on the basis of an independent valuation of the Property as the sale price of the Property" if the relevant company terminated the agreement; this did not mean that the Property encompassed the "Business": [69]. The primary judge's construction of the definition of "Net Sales Price" was not commercially absurd but, even if it was, the appellants' preferred construction of the definition, as encompassing the sales price of the hotel businesses, could not be reconciled with the language of the 2021 HM Agreements: [81]. Although it is not for courts to impute purpose to contractual parties, various textual and contextual matters suggest that a reasonable businessperson would understand that the commercial purpose of the CGBF was to reward the Hotel Manager's contributions to an increase in the value of the Property and Business, not merely the value in the freehold property: [91]. While the primary judge's construction may not reflect the subjective intention of the parties, it is not so inconsistent with the parties' objectively determined intention that words should be read into the definition of "Net Sales Price": [108]-[112].

- In construing item 3 of Sch 2 of the 2021 HM Agreements, the primary judge was correct to exclude the Gaming Machine Entitlements (GMEs) from the meaning of "Property". Although the parties had sought no declarations about the GMEs, if they perceived genuine problems with what her Honour had said on the topic, they might have objected after primary judge's reasons were published but before the making of final orders: [84]-[85], [113].

Australian Intermediate Appellate Decisions of Interest

Institutional Liability: damages; historical sexual abuse

Comensoli v O'Connor **[2023] VSCA 131**

Decision date: 1 June 2023

Beach, Niall and Kaye JJA

From 1968, when he was 11 years old, to 1970, Mr O'Connor had been sexually assaulted by a Catholic Priest. Because of the assaults, Mr O'Connor later suffered from alcohol abuse which negatively impacted his employment, relationships and health. Although the applicant (the Archbishop) assumed his office long after the events and had no personal involvement in them, he could be sued under the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic). The primary judge found in favour of the respondent and awarded damages of $1,908,647 plus interest to be paid by the applicant for personal injury arising from the sexual assaults. The damages comprised $525,000 general damages, $15,000 future treatment expenses and $1,500,000 economic loss. $131,353 was deducted from that amount to account for a payment received by Mr O'Connor under an internal church redress scheme. The Archbishop appealed that decision.

Held: refusing leave to appeal

- The award of $525,000 for general damages was not manifestly excessive: [100]. It was of central importance to acknowledge the tender age at which Mr O'Connor was subject to grave sexual abuse. His ability to navigate the challenges of life was severely compromised: [101]. The task of envisaging the life which Mr O'Connor would have enjoyed if the abuse had not occurred was extremely difficult as he had not established a settled pattern of life before the abuse. It was open to the primary judge to conclude that the effects of the abuse were life changing: [103]. The primary judge took into account all of the relevant factors in determining the extent of the harm the abuse caused to the applicant: [109]. The primary judge was also entitled to draw comparisons with the lives of Mr O'Connor's siblings because they were able to enjoy a level of stability in employment and relationships that he could not achieve: [110]. It was not necessary for Mr O'Connor to call medical evidence from his GP to establish that he continued to suffer the effects of alcohol abuse: [113]. Smaller awards in other cases do not establish error as each award is fact dependent and the destructive impact of child sexual abuse is becoming better understood: [114].

- From the quantum of past economic loss calculated by an accountant, the primary judge correctly reduced the amount by 15 per cent to account for the usual vicissitudes and a degree of uncertainty about the assessment of loss of earning capacity. The primary judge was also correct to ignore economic loss and earnings occurring during the period in which the respondent was incarcerated: [117]-[121], [123]. The primary judge did not err in rounding the figure up to $1,500,000 as the assessment of loss of earning capacity involves a degree of judgment and evaluation: [122].

- The applicant's argument that damages should be reduced to account for a pension received by the respondent was rejected, because the applicant had specifically abandoned that argument at trial: [138]-[142].

Native Title: compensation; extinguishment; Constitutional Law: s 51(xxxi)

***Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia* [2023] FCAFC 75**

Decision date: 22 May 2023

Mortimer CJ, Moshinsky and Banks-Smith JJ

In 2019, the applicant, on behalf of the Gumatj Clan or Estate Group of the Yolngu People, (together, the claimants), brought two applications under s 61 of the *Native Title Act 1993* (Cth): a claimant application, seeking a determination of native title in favour of the Gumatj Clan or Estate Group; and a compensation application, seeking the payment of compensation for the alleged effects on native title of certain executive and legislative acts done after the Northern Territory became a territory of the Commonwealth in 1911, but prior to the *Northern Territory Self-Government Act 1978* (Cth) coming into force. This case follows from a series including the *Gove Land Rights Case.* The thirtieth respondent was the current lessee of one of the mineral leases granted under the *Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968* (NT). The applicant commenced proceedings in the Federal Court in both proceedings and the Commonwealth filed an interlocutory application in the compensation proceedings seeking a hearing of a demurrer (under r 30.01 of the Federal Court Rules) in relation to a number of complexities. Due to the significance of the issues raised, the demurrer was heard by a Full Court.

Held: Answering all of the separate questions "No".

- The Mission Lease did not confer a right of exclusive possession, and therefore did not extinguish the claimants' non-exclusive native title rights because: the Court was bound by *Wurridjal v Commonwealth* [2009] HCA 2; 237 CLR to find that acquisition of property under s 122 of the *Constitution* is required by s 51(xxxi) to be on "just terms"; in that respect, *Wurridjal* overturned *Teori Tau v Commonwealth* (1969) 119 CLR 564; it was therefore unnecessary to decide whether the compensable acts were done under ordinances made under a statutory power sourced not only in s 122 of the *Constitution*, but also in a placitum of s 51; generally, the authorities have confined the application of the concept of inherent defeasibility to rights created by statute; the Court should apply the weight of authority in native title law about the character of native title rights; and native title rights are not inherently defeasible in the sense that description has been applied in the authorities: [57], [203]-[206], [211], [220], [223], [226], [278]-[279], [443], [459], [478]-[479].

- The reservations in the four pastoral leases withheld in favour of the Crown any rights that may exist in relation to minerals. The reservations were not the full assertion of the Crown's beneficial ownership in minerals in a way which was inconsistent with the continuation of the claimants' native title mineral rights. Therefore, the claimants' native title mineral rights (if established) continued after the grants of the pastoral leases. Those rights were also unaffected by the grant of the Mission Lease: [59]-[61], [107]-[117]; [160]-[169], [208], [225]-[226].

- Any native title right in relation to minerals in the claim area was not extinguished by the pastoral lease reservations; all subsisting native title rights in the claim area were not extinguished by the grant of the Mission Lease; and any subsisting native title right in relation to minerals in the claim area was not extinguished by the 1939 Ordinance: [62]-[63], [487].

Asia Pacific Decision of Interest

Companies: director's duties

***BIT Baltic Investment & Trading Pte Ltd (in compulsory liquidation) v Wee See Boon* [2023] SGCA 17**

Decision date: 26 May 2023

Court: Court of Appeal of Singapore

Judith Prakash JCA, Tay Yong Kwang JCA and Belinda Ang Saw Ean JCA

Mr Wee was a director of BIT Baltic before its liquidation. BIT Baltic commenced proceedings in the High Court seeking damages for alleged breaches of fiduciary duties and duties of care, skill and diligence. BIT Baltic claimed that these breaches arose from unfair preference payments that it was caused to make to two companies which amounted to US$1,472,500. Although the payments were refunded before the matter was heard, BIT Baltic continued with the application seeking additional damages from Mr Wee. The primary judge dismissed the claim on the basis that Mr Wee was not aware of the payments when they were made and had nothing to do with making them. BIT Baltic appealed that decision.

Held: allowing the appeal

- The primary judge erred in finding that Mr Wee's obligation to information himself about BIT Baltic's affairs was limited by his status as a local resident director with limited responsibilities. Mr Wee played a material role in BIT Baltic's operations as signatory for several important operational contracts. He also had oversight of the finances: [39]-[41]. Mr Wee actively participated in the financial activities of the company, although he may not have been a main decision maker. As such Mr Wee's obligation to inform himself ofBIT Baltic's affairs was not attenuated: [42]. Regardless, Mr Wee would still be held to the minimum standard that is required from all directors: [43]. Once BIT Baltic became insolvent, Mr Wee's duties included the duty to consider the interests of its creditors as a whole: [44].

- The primary judge erred in finding that Mr Wee did not know about the payments as her Honour restricted the assessment to the time the payments were made. Mr Wee would have known that the payments were to be made at the latest when he signed the Director's Statement to the 2018 Financial Statements, at which time he was still a director and was aware that the company was insolvent: [48]-[52].

- The primary judge correctly found that Mr Wee did not breach his fiduciary duties. He played no part in deciding to prefer the creditors who received the payments over the other creditors of BIT Baltic and was not consulted before the payments were made. There was no point during the payment process at which Mr Wee had the opportunity or need to consider what the interests of BIT Baltic required: [55].

- A director has a duty to stay aware of the company's transactions and to object to and correct misconduct if they become aware of it: [57]. Mr Wee breached his duty to act with care, skill and diligence by failing to make the necessary inquiries about the payments which should have occurred when he became aware of BIT Baltic's insolvency at the latest, and by failing to alert the other directors to the wrongful payment and ask them to take steps to recover the payments: [58], [60].

International Decision of Interest

Constitution: takings clause; Seizure of Property

Tyler v. Hennepin County, Minnesota, et al. **[2023] USSC 166**

Decision date: 25 May 2023

Court: United States Supreme Court

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

Ms Tyler owned a condominium in Minnesota that accumulated about $15,000 in unpaid real estate taxes. The County seized the condo and sold it for $40,000, keeping the $25,000 excess over Ms Tyler's tax debt. Minn. Stat. §§281.18, 282.07, 282.08. Ms Tyler filed suit, alleging that the County had unconstitutionally retained the excess value of her home above her tax debt in violation of the Takings Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment. The District Court dismissed the suit for failure to state a claim, and the Eighth Circuit affirmed that decision.

Held: Allowing the appeal

- Tyler's claim that the County illegally appropriated the $25,000 surplus constitutes a classic pocketbook injury sufficient to give her standing. Even if there were debts on her home, as the County claims, Tyler still plausibly alleged a financial harm, for the County kept $25,000 that she could have used to reduce her personal liability for those debts: Pp. 3-4.
- Whether remaining value from a tax sale is protected under the Takings Clause depends on state law, "traditional property law principles," historical practice, and the Court's precedents. State law cannot be the only source of property rights because otherwise a State could "sidestep the Takings Clause by disavowing traditional property interests" in assets it wishes to appropriate. The consensus that a government could not take more property than it was owed is reflected in the Act of July 14, 1798, §13, 1 Stat. 601, the similar statutes adopted by ten States around the same time, and the Fourteenth Amendment. The Court's precedents have long recognised the principle that a taxpayer is entitled to the surplus in excess of the debt owed and *Nelson v. City of New York*, 352 U. S. 103, in which there was no preclusion on obtaining the surplus but rather a process to claim a surplus, did not change that. Minnesota's scheme, in comparison, provides no opportunity for the taxpayer to recover the excess value. Minnesota law itself recognises in many other contexts that a property owner is entitled to the surplus in excess of her debt. Minnesota may not extinguish a property interest that it recognises everywhere else to avoid paying just compensation when the State does the taking: Pp. 4-12.
- The County's argument that Ms Tyler has no property interest in the surplus because she constructively abandoned her home by failing to pay her taxes was rejected. Abandonment requires the "surrender or relinquishment or disclaimer of" all rights in the property. Minnesota's forfeiture law is not concerned about the taxpayer's use or abandonment of the property, only her failure to pay taxes. The County cannot frame that failure as abandonment to avoid the Takings Clause. Pp. 12-14.