Court of Appeal
Supreme Court
Sydney

Decisions of Interest

5 June 2023 – 18 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

Land Law: strata title

Walker Corporation Pty Ltd v The Owners – Strata Plan No 61618 **[2023] NSWCA 125**

Decision date: 5 June 2023

Leeming, Mitchelmore and Kirk JJA

Walker Corporation Pty Ltd owns lots in two of the seven strata schemes in a Sydney development. It commenced proceedings in the Supreme Court in relation to resolutions passed by three strata schemes, which terminated the appointment of McCormacks NSW Pty Ltd as strata managing agent and appointed Strata Choice Pty Ltd. Walker Corporation argued that the three owners corporations breached cl 8.11 of the strata management statement ("SMS"), which required the owners corporation of each strata lot to retain whichever strata managing agent the building management committee ("BMC") appointed as the Strata Manager. It also contended that two owners corporations had breached a provision of their by-laws, which was in similar terms to cl 8.11. In separate cross-claims, the three owners corporations and the chairperson of one of the owners corporations challenged the validity of cl 8.11 on the basis that the clause was inconsistent with the *Strata Schemes Management Act 2015* (NSW), beyond the power conferred by the *Strata Schemes Development Act 2015* (NSW), and uncertain. The primary judge found in favour of the owners corporations. Walker Corporation sought leave to appeal that decision.

Held: granting leave to appeal but dismissing the appeal

- Clause 8.11 of the SMS was inconsistent with the Management Act and consequently contrary to s 105(5) of the Development Act. The Management Act contemplates that decisions about the appointment of a strata managing agent and the powers or duties to be delegated to it are to be made by the lot owners acting through an owners corporation. The legislative intent is that the owners corporation has primary responsibility for managing the strata scheme and its powers of delegation are to be exercised for the benefit of lot owners. Inconsistently, cl 8.11 extinguished the right of the owners corporation, in a general meeting, to appoint a strata managing agent of its choosing, and to terminate that agent's services if necessary: [10], [37]-[53].
- Clause 8.11 was not authorised by the Development Act. The statutory concept of an SMS as a "management" statement "for the building and its site", and the functions of the BMC as "managing the building and its site" do not extend to a complete takeover of all the functions which may be delegated by an owners corporation to a strata managing agent. The list in cl 4 of Sch 4 of the Development Act of the matters for which an SMS may provide does not support the prescription of management arrangements for the individual strata schemes which form part of the building: [10], [54]-[55]. It was not necessary to consider whether cl 8.11 was invalid for uncertainty: [10], [36], [56].

Negligence: duty of care

Coalroc Contractors Pty Ltd v Matinca (No 2) **[2023] NSWCA 127**

Decision date: 8 June 2023

Meagher, Mitchelmore and Adamson JJA

In 2016, Mr Matinca, a coal miner, was driving home after three successive 12-hour shifts. He suffered serious injury when the car drove off the road across oncoming lanes, and eventually collided head-on with a tree. The accident involved his vehicle only. Mr Matinca commenced proceedings in the Supreme Court arguing that the accident was caused by fatigue induced by the nature and conditions of his work, and that Coalroc Contractors owed him a duty to take reasonable care to manage the risk of such an accident, including on his journey home . The primary judge found that the appellant was negligent in failing to require Mr Matinca to submit for its approval a personal travel management plan specifying how he would manage fatigue on his route home, including a requirement that Mr Matinca stop and rest for about 20-30 minutes, which would have prevented the fatigue-induced accident. Coalroc Contractors appealed that decision.

Held: allowing the appeal

- The onus of proof of causation is not discharged by establishing that a particular matter cannot be excluded as a cause of the injury. Although fatigue is a common cause of single vehicle accidents, it does not follow that it was probably the cause of this accident. Where the cause of the accident was not loss of consciousness but momentary inattention, more evidence is required to discharge the onus which Mr Matinca bore of establishing that fatigue was a cause of the accident, since there were multiple other possible causes and no direct evidence of the accident itself: [56]-[61].

- The fact that an employer takes steps to protect its employees from harm outside the work environment does not mean that the employer necessarily owes a duty of care to protect its employees until they arrive home safely after work. If the appellant really had the suggested duty, its only purpose would be to highlight to employees the importance of managing fatigue on the way home. It is difficult to discern how providing a travel plan which could neither be enforced nor monitored would amount to a reasonable precaution: [68]-[71].

- The primary judge's findings on causation are not supported by the evidence. The decrease in risk as a result of a rest break, which the primary judge found would have avoided the subject accident, is no more capable of proving negative causation than an increase in risk is capable of proving causation positively: [75]-[78], [80], [83]-[84].

Legal Practitioners: fidelity fund; consequential loss

***Jacups v Council of the Law Society of New South Wales* [2023] NSWCA 130**

Decision date: 9 June 2023

Meagher, Mitchelmore and Gleeson JJA

The Fidelity Fund Management Committee disallowed Mr Jacups' claim on the Legal Practitioners Fidelity Fund for "pecuniary loss" as a result of "defaults" by his former (now deceased) solicitor. The claim had two parts: $79,900, being the proceeds of a mortgage loan used to purchase two bank cheques which were drawn in favour of the solicitor and his trust account respectively; and a claim for consequential losses of $1,030,000 which Mr Jacups alleged resulted from the solicitor's failure to pay the $79,900 in accordance with his instructions. Mr Jacups appealed that decision to the Supreme Court under s 247 of the *Legal Profession Uniform Law* (NSW). The primary judge dismissed the appeal on the basis that Mr Jacups had not suffered any "pecuniary loss" as a result of any "default" for the purposes of s 233 of the Uniform Law. His Honour found that $9,900 was paid to the solicitor for legal services which had been provided and invoiced; that $70,000 was trust money which was disbursed by the solicitor in accordance with the appellant's instructions; and that the $1,030,000 was not "pecuniary loss" resulting from any "default". Mr Jacups appealed that decision.

Held: dismissing the appeal

- The claim for $1,030,000 was not recoverable from the fidelity fund. Under s 241(1) of the Uniform Law, the maximum amount payable after a trust money "default" by a law practice is the amount of "pecuniary loss" resulting from that "default". The definition of "pecuniary loss" was structured so that each of its paragraphs corresponds to a paragraph of the definition of "default". When the claimed default fell within one paragraph, recovery was available only for the type of "pecuniary loss" defined in the corresponding paragraph. Applying this approach, , where the claimed "default" is a law practice's failure to pay or deliver trust money (paragraph (a)), the maximum amount recoverable as "pecuniary loss" is the amount of trust money not paid or delivered (paragraph (a)): [32]-[44].

- The $9,900 was not paid to the solicitor to be held on trust. On 18 May 2003, the appellant gave a handwritten note to the solicitor which proposed that an unspecified portion of that amount be paid to the solicitor, and that the balance be paid into Mr Jacups' account. The proceeds of the two bank cheques were dealt with substantially in accordance with that proposal: [51]-[55]. The amounts of $9,900 and $70,000 were not subject to any Family Court orders or instructions by the appellant that they be applied to satisfy adverse costs orders against him: [56]-[64].

- The amount of $70,000 was disbursed in accordance with the appellant's instructions. The primary judge was justified in not accepting the appellant's evidence that his signature on various documents authorising the disbursements was forged: the solicitor had died well before the claim was made, no expert evidence was led to support a conclusion of forgery, and there was no contemporaneous or incontrovertible evidence supporting a finding of forgery. There was also evidence which was inconsistent with the appellant's allegations: [65]-[70].

Corporations: insolvency; Private International Law: jurisdiction; immunities

Greylag Goose Leasing 1410 Designated Activity Company v P.T. Garuda Indonesia Ltd **[2023] NSWCA 134**

Decision date: 14 June 2023

Bell CJ, Meagher and Kirk JJA

Two companies, together Greylag Goose, are incorporated in Ireland and lease aircraft to PT Garuda Indonesia Limited, the national airline of Indonesia. Garuda is a foreign company registered under Div 2 of Pt 5B.2 of the *Corporations Act 2001* (Cth) and is a "separate entity" of a foreign state within the meaning of that term in the *Foreign States Immunities Act 1985* (Cth) (FSIA). Greylag Goose commenced proceedings in the Supreme Court seeking orders that Garuda be wound up. Garuda sought a declaration that it was outside the Court's jurisdiction because of the immunity for foreign states in s 9 of the FSIA. Greylag Goose resisted Garuda's application on the basis of s 14(3) of the FSIA, as a qualification to the immunity in s 9. Specifically, Greylag Goose contended that Garuda, as a "foreign state" was "not immune…as the proceeding concern[ed]…insolvency or the winding up of a body corporate" per s 14(3)(a). The primary judge held that Garuda was immune from the winding-up proceeding on the basis that Greylag Gooses' literal construction of s 14(3)(a) should be rejected. Greylag Goose sought leave to appeal.

Held: granting leave to appeal but dismissing the appeal

- Section 14(3)(a) of the FSIA does not subject a foreign state (or a separate entity of a foreign state) to a winding up proceeding: [13]. The Australian Law Reform Commission Report Foreign State Immunity is relevant context for interpreting the FSIA and s 14(3): [18]-[22], [51], [53]-[77]. On its proper construction, s 14(3)(a) relates to a bankruptcy, insolvency or winding up in which a foreign state has or claims an interest in property with which the relevant proceeding is concerned: [38]-[49].
- The ALRC Report reinforced the conclusion that s 14 of the FSIA was directed towards cases where a foreign state held, or claimed, property interests in the estate of a bankrupt, insolvent company or body corporate that was being wound up, and was not intended to subject a foreign body corporate (which the FSIA, by operation of s 22, treated as having the benefits of a foreign state's immunity) to winding up proceedings in Australia: [44], [64]-[77]. The body corporate referred to in s 14(3)(a) and which is not otherwise defined in the FSIA should be interpreted as referring to a body corporate "in and of the Commonwealth" (*Acts Interpretation Act 1901* (Cth) s 21(1)(b)): [45].

Australian Intermediate Appellate Decisions of Interest

Administrative Law: fraud perpetuated on tribunal

Bullard v Tasmanian Industrial Commission and MC **[2023] TASFC 3**

Decision date: 15 June 2023

Gleason J, Marshall and Porter AJJ

MC (a former teacher) had impregnated a year 10 student in 1989. Consequently, he resigned but was re-employed in 1992. When, in 2020, Mr Bullard (the Secretary of the Department of Education) discovered what had happened in 1989, he decided to suspend MC with pay. The Teachers Registration Board Tasmania eventually suspended MC's registration as a teacher and, as he was not registered, suspended him without pay. The Industrial Commission decided in 2021 to direct the appellant to treat MC as suspended on full pay. Mr Bullard applied to the Supreme Court under the *Judicial Review Act 2000* (NSW) seeking to quash the Commission's decision. The primary judge dismissed the application but did not have before him correspondence dating to 1989 which provided evidence that MC admitted the allegations in front of multiple witnesses. Mr Bullard appealed that decision.

Held: allowing the appeal

- Mr Bullard did not deny MC natural justice: there was nothing he could have said which would have influenced the decision as he had already admitted to the conduct: [26].
- Had the 1989 correspondence and MC's admissions been before the primary judge, in all likelihood he would have found that the review conducted by the Commission under s 51 of the *State Service Act 2000* (TAS) was not a proper review, but was affected by jurisdictional error given the parties' failure to make a full and frank disclosure of relevant facts: [28]-[29], [56]-[57]. Section 51 of the *State Service Act* does not limit the Commission i to material that was before the original State Service decision-maker: [60]-[61]. Leave should be granted for Mr Bullard to add a new ground of appeal being that the Commission's decision was affected by fraud due to the parties' failure to detail the allegations and the evidence that MC had admitted that they were true: [30]. In dissent, Porter AJ found that leave should be refused as the new ground had no reasonable prospects of success: [124]-[125].
- Clause 7 of the *Teaching Service (Tasmanian Public Sector) Award* means that a teacher must maintain registration and that if the teacher does not have a current registration certificate, their salary will not be paid. However where "circumstances beyond the employee's control" have caused the teacher's registration to lapse, salary will be paid: [42], [44]. There is no justification for arbitrarily limiting the circumstances which are beyond the employee's control: [46], [55]. In dissent, Porter AJ found that cl 7 only applies where the employee is qualified to be registered but has not applied to be registered, or a registration has lapsed, and the employee has not re-applied: [95].
- The suspension of registration did not automatically require Mr Bullard to stop paying MC's salary: that interpretation would leave no work for the exception in cl 7. If, on a proper construction of an award, an employee can in a rare case receive full payment even when full service or no service is rendered, the award must be obeyed: [48]-[52].

Health Law: guardianship

***TGN v MCN and The Public Advocate* [2023] SASCA 62**

Decision date: 9 June 2023

Doyle and Bleby JJA and Dalton AJA

The applicant's son, N, suffers from severe autism, intellectual disability and bipolar disorder. In 2018, following disputes between N's parents as to his care, the Public Advocate was appointed full-time guardian for N. After the guardianship order was made, the Public Advocate allowed N to live at home with his mother as he had before the order. She cared for him with the help of paid service providers. In 2021 the Public Advocate determined that N was to live with, and be cared for, by disability service providers, rather than his mother. The applicant lodged an application to the South Australian Civil and Administrative Tribunal (SACAT) to vary or revoke the guardianship order. The application was dismissed. The applicant lodged a fresh application on 30 December 2021. An SACAT member dismissed that application on the basis that the applicant failed to demonstrate that the reason for her application was a change in her son's circumstances as required by of s 33(1a)(i) of the *Guardianship and Administration Act 1993* (SA) (GA Act). The applicant sought an internal review which was dismissed by the President of SACAT. The applicant appealed that decision.

Held: allowing the appeal

- The term "circumstances" in s 33(1a)(a) of the GA Act can include the effect on the protected person of decisions made by the guardian, including where that guardian is the statutory guardian: [23]. The term includes any circumstance related to the relevant person's health, safety and welfare, and extends to any circumstance which would have been relevant in deciding whether to appoint a guardian in the first place, including whether it might have been appropriate to order a limited guardianship, or to make any guardianship subject to conditions: [34].
- There is no rule that when an application for revocation or variation is brought, that SACAT may not assess whether the Public Advocate has been a suitable guardian or has acted properly in the interests of a protected person. If poor decision-making or care has had a detrimental effect on the protected person, that will amount to a "circumstance" within the meaning of s 33(1a)(a) of the GA Act: [26].
- The effect of s 33(1a)(a)(i) of the GA Act is that before an application can proceed to hearing, the applicant must satisfy the tribunal that the *reason* for the application is a change in the circumstances of the protected person. Whether it has been proved that there has in fact been a change in circumstances is a different matter: [41]-[42].

Asia Pacific Decision of Interest

Real Property: caveats

Lendich v Codilla **[2023] NZCA 222**

Decision date: 9 June 2023

Court: New Zealand Court of Appeal

Katz, Whata and Davidson JJ

Forty years ago, Lendich Heavy Equipment Limited (LHEL) transferred a property to a long-term company employee, Mr Posa. At the time, Mr Lendich was the governing director of LHEL and he and his wife were the shareholders. Mr Posa was also Mr Lendich's friend. Mr Posa died in 2018 and Mr Codilla is the executor of his estate. Mr Lendich claims an interest in the property under a resulting trust on the basis that he never intended that Mr Posa would become the beneficial owner of the property and be able to sell or bequeath it. Mr Lendich applied to the Supreme Court seeking an order that a caveat he lodged in 2021 on the title of the property not lapse. The primary judge declined the application on the basis that Mr Lendich did not retain a beneficial interest in the property and thus did not have a caveatable interest by function of a resulting trust. Mr Lendich appealed that decision.

Held: dismissing the appeal

- Where there is evidence that $1.00 of consideration was agreed upon and paid by Mr Posa and given that the courts are not concerned with the adequacy of consideration, a resulting trust did not arise. Even if the $1.00 had not been paid, a resulting trust may still not have arisen; rather, the agreed purchase price would have remained owing as a debt payable to LHEL by Mr Posa's estate: [85]-[88], [114]. The evidence indicated that Mr Lendich intended to transfer the entire beneficial interest to Mr Posa rather than retain it himself, as required for a resulting trust: [90]-[91].
- The close personal friendship between Mr Lendich and Mr Posa, the fact that Mr Lendich subdivided the property and created a separate title to transfer to Mr Posa, the fact that he never discussed with Mr Posa his intention to retain beneficial ownership of the property and the terms of a previous incomplete transaction between the parties make it implausible that Mr Lendich intended to retain the beneficial interest: [93]-[100], [115].
- Between the transfer of the property and Mr Posa's death, Mr Posa believed he had full ownership of the property because he undertook building work on the house at his own cost and attempted to dispose of it in his will. Mr Lendich's offer to purchase the proper from Mr Posa's estate also suggested that he knew that Mr Posa was the owner of the legal and beneficial interest: [101]-[111], [115].

International Decision of Interest

Taxes and Duties: excise duty

***JTI POLSKA Sp. Z o.o. & Ors v Jakubowski & Ors* [2023] UKSC 19**

Decision date: 14 Jun 2023

Court: United Kingdom Supreme Court

Lord Reed (President), Lord Hodge (Deputy President), Lord Briggs, Lord Sales, Lord Hamblen, Lady Rose, Lord Richards

The respondents contracted with the appellant to transport a consignment of cigarettes from Poland to England. The road carriage was subject to the *Convention on the Contract for the International Carriage of Goods by Road 1956* (CMR). During transit, while the vehicle was parked in a service station in England, some cases of cigarettes were stolen. The respondents incurred excise duty under a European excise duty arrangement, . The respondents claimed compensation from the appellants under the CMR. The parties settled the claim save as to the excise duty claimed by the respondents under art 23.4 of the CMR. That article allows a cargo claimant to claim "carriage charges, Custom duties and other charges incurred in respect of the carriage of the goods", in addition to the value of the goods claimed. At issue were two conflicting interpretations of the phrase "other charges incurred in respect of the carriage of the goods" in art 23.4. The "broad interpretation" is that it encompasses charges incurred because of the way that the goods were actually carried and lost, so that a cargo claimant can recover excise duty levied on goods stolen in transit. The "narrow interpretation" is that it is limited to those charges which would have been incurred if the carriage had been performed without incident and so does not include excise duty levied as a result of the loss of the goods in transit through theft. The High Court granted a certificate that the case was suitable for an appeal directly to the Supreme Court due to the criticism of *James Buchanan & Co. Ltd v Babco Forwarding & Shipping (UK) Ltd.* [1978] AC 141 *(Buchanan)*.

Held: dismissing the appeal

- The Practice Statement (Judicial Precedent) [1966] 1 WLR 1234 resolved that, while House of Lords and Supreme Court decisions are normally binding, they can be departed from when it appears right to do so: [37], [40]. There is less scope for reconsidering a decision involving a question of interpretation than one involving a common law rule: [41]-[42]. A previous decision on interpretation will not be departed from if it reflects a tenable view: [43].

- Although there are powerful arguments in favour of the narrow interpretation, the broad interpretation is tenable because it reflects the conclusion of the judges at all levels in *Buchanan* and that reached by the supreme courts of multiple other CMR states: [98]-[99]. As to ordinary meaning, it is difficult to say that a loss which occurs during the course of road carriage and as a result of the way that carriage is performed is not connected with that carriage: [101]. There is force in the argument that the wording of art 23.4 is different to that in art 6.1(i), which refers to charges "incurred from the making of the contract to the time of delivery", a formulation which can readily refer to charges incurred for the narrow purpose of carriage: [102].

- The statement in *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113; [2003] QB 1270 that *Buchanan* should not be applied any more widely than the doctrine of precedent requires, should not be followed: [113]. Academic disapproval is not unanimous and there is no international consensus: [116]. It was not shown that the *Buchanan* decision works unsatisfactorily in the marketplace. It was not appropriate for the Court to exercise its power under the Practice Statement and depart from *Buchanan*: [117]-[118].

- Reversing *Buchanan* would not achieve a uniform view as to art 23.4's interpretation; rather art 23.4 would need to be amended which is a matter for the parties to the CMR: [120].