Court of Appeal
Supreme Court
Sydney

Decisions of Interest

19 June 2023 – 2 July 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

Insurance: life insurance

Resolution Life Australasia Ltd v N.M. Superannuation Pty Ltd **[2023] NSWCA 138**

Decision date: 22 June 2023

Meagher and Adamson JJA and Basten AJA

As trustee of a superannuation fund, NM Super, arranged and administers life risk insurance, provided by RLA, for many of its fund members. In 2022, NM Super invited proposals from other life insurers to be primary insurer with respect to the cover provided to that portfolio of members, in a "Request for Proposal" (RFP). RLA commenced proceedings in the Supreme Court to restrain NM Super from continuing the RFP process on the basis that it amounted to a breach of an implied term in the four contracts. The primary judge found that the term was that NM Super was to "do what is necessary on its part to enable [RLA] to have the benefit of [that] contract and [not to] hinder or prevent the fulfilment of the purposes of the express promises made in the contract". RLA's claim was based on a threatened breach of the second limb of this covenant. Under each contract, monthly premiums must be paid in advance. The implied term was said to prevent NM Super from allowing the insurance to lapse by non-payment of premiums so as to enable life insurance provided by RLA to be replaced through the RFP. The primary judge held that NM Super had made no such promise, and dismissed RLA's claim. RLA appealed the finding that there was no promise by NM Super to pay monthly premiums.

Held: dismissing the appeal

- If a contract of life insurance is from year to year with an irrevocable offer to renew, then the life insured is ordinarily not bound to renew. Conversely, if the cover continues in force conditionally upon the timely payment of instalments of premium, then non-payment may result in a breach and lapsing of the cover. The question remains whether the contracting insured has promised to pay those monthly premiums: [46]-[59], [86], [93].

- The contracts did not contain a promise by NM Super to pay premiums, which accommodated its statutory and equitable obligations as trustee to act in accordance with a fund member's reasonable instructions and best interests. Those obligations formed part of the context in which the relevant payment provisions were to be construed. The trustee allowing a fund member's cover to lapse by non-payment of premiums if it was instructed to do so or considered that doing so was in the member's best interests would require the trustee to act in breach of the promise contended for: [12], [42]-[45], [70]-[71], [86], [93].

- RLA's construction would impose an obligation which is not the subject of an express promise or capable of being enforced or necessary to compel payment; and in circumstances where the performance of NM Super's duty to act in the best interests of a member may require that it breach such an obligation in order to satisfy that duty: [34], [60]-[79], [86], [93]. The provisions of the contract relied upon by RLA as containing a promise to pay are directed to the time by which and amount in which premium must be paid to satisfy the condition precedent and avoid the lapsing of the cover. In the absence of such a promise, the second limb of the implied term had nothing to operate on: [29]-[79], [86], [93].

- A term which prevents the trustee from investigating whether other insurers might be able to provide life insurance cover for its members on better terms than RLA offered and from engaging such insurer, if better terms were forthcoming, ought not be implied because complying with the term would put the respondent in breach of its statutory obligations imposed by s 52 of the *Superannuation Industry (Supervision) Act 1993* (Cth): [91].

Civil Procedure: application for medical examination of plaintiff

Chopra v State of NSW (South Western Sydney Local Health District) **[2023] NSWCA 142**

Decision date: 27 June 2023

Mitchelmore and Kirk JJA and Simpson AJA

Ms Chopra was assaulted by a patient while employed as a nurse at Blacktown Hospital. She suffered physical and psychological injuries and was diagnosed with post-traumatic stress disorder. She commenced proceedings in the District Court against the State of NSW claiming work injury damages. Before proceedings commenced, the parties engaged in the procedural steps required under the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) ("WIM Act") which included the provision of reports from two psychiatrists Dr Khan and Dr Rastogi which did not address the applicant's psychological condition. The State of NSW applied to the District Court for an order under r 23.4 of the UCPR that she attend psychometric testing with a psychologist, Dr McMahon to evaluate the risk of the applicant exaggerating or feigning her condition. The State of NSW relied on reports by Dr Khan and Dr Rastogi, which emphasised the (lack of) clinical merit of psychometric testing and the associated risks to the Ms Chopra's mental health. The primary judge made the order sought. Ms Chopra sought leave to appeal that decision.

Held: granting leave to appeal and allowing the appeal

- The primary judge's exercise of the discretion to make an order under r 23.4 of the UCPR miscarried in a manner that was productive of substantial injustice to the applicant. Significantly, her Honour failed to take into account the unchallenged medical evidence that not only questioned the efficacy of the testing having regard to the applicant's circumstances, but also raised serious concerns that it would be detrimental to her health (*Waterways Authority v Fitzgibbon* [2005] HCA 57; (2005) 79 ALJR 186). Consequently, it was unnecessary to consider the other grounds of appeal: [5], [33], [35]-[38].

- In re-exercising the discretion under r 23.4, the reasonableness of the applicant's refusal to attend the testing outweighed any reasonableness of the respondent's request. The clinical notes upon which the respondent's instructing solicitor relied were not clearly linked to any alleged potential for exaggeration or feigning and, in so far as they referred to the applicant's memory issues, that had been identified before August 2022. The respondent's evidence as to the purpose of the testing was not specific to the applicant's case, unlike the applicant's medical evidence in opposition to the testing which indicated, significantly, that the testing could result in an acute deterioration in her psychiatric condition. The central purpose of the request was to test the applicant's veracity generally. The issue of delay was a matter of speculation, upon which not much weight was placed: [5], [39]-[50].

Education: financial assistance to non-government schools

***Malek Fahd Islamic School Limited v Minister for Education and Early Learning* [2023] NSWCA 143**

Decision date: 29 June 2023

Ward P, Meagher JA and Basten AJA

The appellant operates a non-government school which receives government funding from the Minister for Education and Early Learning. To be eligible for government funding a non-government school must not operate for profit. In 2017 the Minister was made aware that the appellant had been operating for profit in 2014 and 2015, when the appellant had received $11,065,584.69 in financial assistance. On 5 March 2021 the respondent wrote to the appellant to inform it that, under s 83J(3)(b) of the *Education Act 1990* (NSW), the provision of future financial assistance would be reduced by $2,213,116 per annum for five years to recover the government funding paid during the period in which the school was ineligible. In 2021, the appellant commenced proceedings in the Supreme Court seeking judicial review of that decision, arguing that the six year limitation period under the *Limitation Act 1969* (NSW) had expired and any debt was extinguished. The primary judge found that the debt had not been extinguished as the limitation period only ran from when the Minister's Advisory Committee recommended that a non-compliance declaration be made in relation to the appellant. The appellant appealed that decision

Held: dismissing the appeal

- Section 83J(3) of the *Education Act* created two methods of recovering financial assistance paid to an ineligible school: a cause of action in debt which might be pursued in a court and falls within s 14(1)(d) of the *Limitation Act*, and by reducing future financial assistance which did not fall within s 14(1): [27]. The *Limitation Act* defines the term "action" to include "any proceeding", thus expanding the category of proceedings in a court. Proceedings in the supervisory jurisdiction do not fall within the conventional understanding of an "action" but would be covered by the extended definition using the phrase "any proceedings". Non-curial processes are not: [33]. As a matter of statutory construction, the presumption is that Parliament, in creating the novel right, attaches to it the particular mode of enforcement as part of its statutory scheme. To that extent the enactment is a code: [52]. Although one mechanism for recovery of the amount is by court process, the amount is not stated to be a debt but merely an amount recoverable "as" a debt. Further, s 83J(3)(a) and (b) are expressed in the alternative. The structure of the provision thus isolates recovery by reduction of future assistance and uses language which is distinct from recovery of a debt in a court: [50], [56]-[57].
- There is no right of recovery under Pt 7, Div 3 of the *Education Act* until two statutory preconditions have been satisfied, being: a recommendation by the Advisory Committee and the giving of notice of the recommendation to the affected school. Once those conditions have been met, it is open to the Minister to be satisfied that the basis for recovery has been established: [61]. The primary judge's view that the cause of action arose at the date of the recommendation of the Advisory Committee should not be accepted. Rather, a right of recovery arises upon the satisfaction of the Minister that a school has been the recipient of an unlawful payment, or that the school is otherwise a non-compliant school: [62], [64].

Interlocutory Appeal; Building and Construction

***A-Civil Aust Pty Ltd v Ceerose Pty Ltd* [2023] NSWCA 144**

Decision date: 29 June 2023

Payne JA, Simpson and Basten AJJA

A-Civil was a subcontractor of the first respondent, Ceerose, in relation to two developments. In 2022, A-Civil served Ceerose with separate payment claims under the *Building and Construction Industry Security of Payment Act 1999* (NSW). Ceerose disputed both claims. An adjudicator was appointed and issued two determinations that Ceerose pay moneys to A-Civil. Ceerose challenged the determinations in the Supreme Court. The amounts the subject of the determinations were paid into Court. Justice Darke found that each determination was affected in part by jurisdictional error, and set each determination aside in part. The appeal from that decision is pending. Ceerose has sought a stay of any payment out to A-Civil of the funds paid into Court the basis that payment out be stayed until completion of yet to be commenced contract proceedings contemplated by s 32 of the *Security of Payment Act* and, pending determination of the appeal. A-Civil produced various documents in response to interlocutory orders. On 20 April 2023, Ceerose served a notice to produce, which A-Civil sought to set aside. The primary judge held that A-Civil should produce, subject to a confidentiality regime, the entirety of A-Civil's electronic financial records. A-Civil applied for leave to appeal from that order.

Held: granting leave to appeal and allowing the appeal

- The policy of the *Security of Payment Act* is to ensure that a contractor who carries out construction work for a principal receives progress payments for that work. The risk that the contractor might not be able to refund moneys due to the principal after a successful action under the contract is assigned to the principal: [19]-[20]. This policy is underlined by s 32B, which denies the benefits of the legislation only to companies in liquidation. Where money is paid into court at the beginning of a case seeking to set aside an adjudicator's determination, the court may stay the payment out of that money pending resolution of the judicial review. The court may also grant an injunction or stay pending final resolution of related contractual proceedings. In exercising either of these powers, the principles governing the grant of interlocutory relief will be constrained by the need to give effect to the statutory policies of the *Security of Payment Act*: [21]-[22], [31]. The application of these principles is a matter of general importance warranting the granting of leave to appeal. The effect of the order for production of financial records by the party not bearing the onus of proof in relation to solvency is unusual: [32]-[33].

- The notice to produce sought production of documents referred to in an earlier affidavit which A-Civil did not rely on. Ceerose was not entitled to investigate any doubt or question about those documents by conducting an enquiry into the solvency of A-Civil: [37]-[38].

- Further evidence which fails to assist in establishing the insolvency of a sub-contractor should not be admitted on appeal. The additional affidavit evidence Ceerose sought to rely on would not impact the outcome of the re-exercise of the relevant discretion. Whether or not s 75A(7) of the *Supreme Court Act 1970* (NSW) applies to an application for leave to appeal, withholding evidence to the day of the hearing is not to be condoned: [41]-[45].

- No order should be made ordering the production of the entirety of the financial records of A-Civil. Ceerose did not establish an entitlement to the extensive documents sought or a basis for finding that there was a real likelihood that it would not be able to recover from A-Civil any amount which ultimately proved to be an over-payment: [51]-[52].

Australian Intermediate Appellate Decisions of Interest

Evidence: penalty privilege

Rolfe v The Territory Coroner & Ors **[2023] NTCA 8**

Decision date: 28 June 2023

Grant CJ, Barr and Brownhill JJ

In 2022, a coronial inquest commenced in relation to the death of Mr Walker who was shot by Mr Rolfe (who was a police officer) in the course of an attempted arrest. Mr Rolfe was charged with murder but was acquitted of murder, manslaughter and engaging in a violent act causing death by a jury. During the inquest, a police officer who had been called as a witness objected to giving evidence on the basis that penalty privilege provided him an immunity from examination in respect of any matter that might tend to expose him to a disciplinary penalty under the *Police Administration Act 1978* (NT). The Coroner dismissed the objection non the basis that the application of penalty privilege had been modified by s 38 of the *Coroner's Act 1993* (NT). One of the police officers who was being compelled to give evidence appealed that decision to the Supreme Court, which found that the penalty privilege does not apply as a matter of course unless abrogated by statute is not a fundamental common law right like the privilege against self-incrimination. Mr Rolfe appealed that decision.

Held: dismissing the appeal

- The presumption against interference with common law rights may be rebutted by necessary implication which can be discerned from whether the operation of the penalty privilege would contradict or diminish the operation of the legislation and the achievement of its purposes: [46].
- Unlike the privilege against self-incrimination, s 38 of the Act as originally enacted did not import penalty privilege into the conduct of coronial proceedings: [49], [58]. A coronial inquest is inquisitorial and can proceed contrary to the rules of evidence and procedure, suggesting that penalty privilege did not apply in proceedings under the Act as originally enacted: [55]. The purpose of the Act and the broad powers conferred on the coroner support that conclusion: [56]
- Penalty privilege was abrogated by the 2002 amendment to s 38 of the Act: [59], [73]. Section 38 of the Act was based on s 47 of the *Coroners Act 1996* (WA), which was based on s 11 of the *Evidence Act 1906* (WA). Therefore, using the word "criminate" did not indicate an intention for s 38 to apply to penalty privilege and the privilege against self-incrimination: [63]-[69]. The second reading speech, the legislative intention, and the fact that the legislature had abrogated the privilege against self-incrimination suggests that s 38 is concerned only with the qualification of the privilege against self-incrimination and did not import a modified form of penalty privilege into coronial proceedings: [71]-[78].

Bankruptcy and Insolvency; Administrative Law

***Inspector-General in Bankruptcy v Rutherfurd (Bankrupt)* [2023] FCAFC 99**

Decision date: 28 June 2023

Rares, Rofe and Downes JJ

The first respondent was made bankrupt in 2017. In 2020, the trustee issued notices of income contribution assessment. The first respondent requested a review of the decision to make an assessment under s 139ZA(1)(b) of the *Bankruptcy Act 1966* (Cth). The Inspector-General declined that request. The Administrative Appeals Tribunal found that it did not have the power to carry out a review of the trustee in bankruptcy' and make a fresh income contribution assessment. The Federal Court set aside that decision.

Held: allowing the appeal

- Unless a decision is made to conduct the review, the Inspector-General does not have the power to set aside the trustee's decision and make a fresh assessment (s 139ZD). No such decision was made in this case and so the powers available under s 139ZD were not conferred: [32]-[36], [38].
- The correct characterisation of the decision under review by the Tribunal was the Inspector-General's decision refusing a request to review a decision by the Trustees. As such, the Tribunal may only exercise the same powers as the Inspector-General had under the applicable legislation by reason of s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth) for the purpose of reviewing that decision, As the power to set aside the decision of the trustee and made a fresh assessment was not conferred on the Inspector-General because no review was conducted that power was not conferred on the Tribunal: [45]-[46].
- *Re Gee v Director-General of Social Services* (1981) 58 FLR 347; [1981] AATA 21 concerned the proper construction of different legislation and has been confined by later cases. Therefore, it should not be relied on to prefer an expansive construction of the *Bankruptcy Act*: [50]-[51], [53]. Ultimately, the correct characterisation of a decision under review and of the associated powers which may be exercised by the Tribunal on that review turns on the legislation in question: [58].
- The expedition of an insolvency administration is one of many, as opposed to the sole, purpose of the statutory scheme. Regardless, it cannot be assumed that it would be more expedient for the Tribunal to decide for itself whether to conduct a review and, if so disposed to conduct a review, to do so: [61]-[65].
- The word "or" in s 139ZF should not be given a conjunctive meaning as the context and purpose of the provision does not provide a reason to depart from giving the word its ordinary disjunctive meaning: [66]-[70].
- If the Inspector-General makes a decision refusing a request to review a decision by a trustee to make an assessment, and an application is brought to review that decision under s 139ZF(b) of the Act, the Tribunal does not have the power to set aside the decision of the trustee and make a fresh assessment under s 139W(2): [71].

Asia Pacific Decision of Interest

Arbitration: confidentiality of records and deliberations

***CZT v CZU* [2023] SGHC(I) 11**

Decision date: 28 June 2023

Court: Supreme Court of Singapore

Chua Lee Ming J, Dominique Hascher IJ and Sir Jeremy Cooke IJ

CZU commenced proceedings in the arbitral tribunal against CZT. The arbitral tribunal, by a majority, issued an award against CZT. The Minority issued a dissenting opinion and made several serious allegations against the Majority. CZT applied to the Supreme Court of Singapore to set aside the arbitral award and for orders that the members of the Tribunal produce their records of deliberations on the basis that the records of deliberations are relevant and material to CZT's case that: the Majority decided a key liability issue on grounds that are not contained in the Final Award, amounting to a breach of the fair hearing rule; the Majority attempted to conceal the true reasons behind the Final Award; and the Majority lacked impartiality. The records of deliberations of an arbitral tribunal are protected against production orders, but this protection is subject to exceptions. CZU opposed these applications on various procedural reasons.

Held: declining to order that the tribunal members' records of deliberations be produced

- The confidentiality of deliberations, like the confidentiality of arbitration proceedings, exists as an implied obligation in law. The policy reasons for the protection of confidentiality of arbitrators' deliberations are: confidentiality is a necessary pre-requisite for frank discussion between the arbitrators; freedom from outside scrutiny enables the arbitrators to reflect on the evidence without restriction, to draw conclusions untrammelled by any subsequent disclosure of their thought processes, and to change these conclusions on further reflection without fear of subsequent criticism; the duty on the tribunal to keep deliberations confidential protects the tribunal from outside influence; and this rule helps to minimise spurious annulment or enforcement challenges based on matters raised in deliberations: [44].

- The protection of the confidentiality of deliberations does not apply where the challenge is to the essential process rather than the substance of the deliberations because they do not involve an arbitrator's thought processes or reasons for his decision: [50]. A case would fall within the exception if the interests of justice in ordering the production of records of deliberations outweigh the policy reasons for protecting the confidentiality of deliberations. Such exceptions are only to be found in the rarest of cases and would have to involve very serious allegations with real prospects of success: [52], [53]. In this case, the allegation of breach of the fair hearing rule was not sufficient to displace the protection of the confidentiality of deliberations. Besides, this allegation can be decided based on the arbitration record; the records of deliberations are unnecessary: [59].

- It is not necessary to determine whether lack of impartiality could constitute an exception, although it is arguable because impartiality is fundamental to the integrity of arbitration proceedings: [61]–[68]. A draft award submitted to the ICC Court for scrutiny comprises part of the records of deliberations: [71]–[73].

International Decision of Interest

Extraterritoriality

Ambitron Austria GMBH et al v. Hetronic International Inc. **[2023] USSC 600**

Decision date: 29 June 2023

Court: United States Supreme Court

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

This case requires the Court to decide the foreign reach of §1114(1)(a) and §1125(a)(1), two provisions of the *Lanham Act* 15 USC ch 22 which prohibit trademark infringement. Hetronic (a US company) commenced proceedings in the Western District of Oklahoma against six foreign parties (collectively, Abitron) seeking damages for worldwide trademark violations. The claim was brought under §§1114(1)(a), 1125(a)(1) of the *Lanham Act*, both of which prohibit the unauthorized use in commerce of protected marks when, inter alia, that use is likely to cause confusion. Abitron claimed that the sought extraterritorial application of those provisions was impermissible. The District Court rejected Abitron's argument. Hetronic was awarded $96 million in damages and a permanent injunction preventing Abitron from using Hetronic's marks worldwide. The Tenth Circuit affirmed the extraterritorial application. Abitron appealed that decision.

Held: allowing the appeal

- In accordance with the presumption against extraterritoriality, §1114(1)(a) and §1125(a)(1) of the *Lanham Act* are not extraterritorial and extend only to claims where the infringing use in commerce is domestic: Pp. 7–10, 14–15.
- The presumption against extraterritoriality serves to avoid the international discord that can result when US law is applied to conduct in foreign countries and reflects the common sense notion that Congress generally legislates with domestic concerns in mind (*RJR Nabisco, Inc. v. European Community*, 579 U. S. 325). Applying the presumption involves two steps, being: whether the statute is extraterritorial, and if not, whether a suit seeks a (permissible) domestic or (impermissible) foreign application of the provision which requires courts to identify the focus of congressional concern underlying the provision at issue and ask whether the conduct relevant to that focus occurred in United States territory: Pp. 3–5.
- Neither provision at issue provides an express statement of extraterritorial application or any other clear indication that it is one of the "rare" provisions that nonetheless applies abroad. Both simply prohibit the use "in commerce" of protected trademarks when that use "is likely to cause confusion": Pp. 5–7.
- The question regarding permissible domestic application turns on the location of the conduct relevant to the focus of the statutory provisions. The conduct relevant to any focus the parties have proffered is infringing use in commerce. Both provisions prohibit the unauthorized "use in commerce" of a protected trademark when that use "is likely to cause confusion." Confusion is not a separate requirement but rather is simply a necessary characteristic of an offending use. Because Congress has premised liability on a specific action (a particular sort of use in commerce), that specific action would be the conduct relevant to any focus on offer today: Pp. 7–10, 14–15.