Court of Appeal
Supreme Court
Sydney

Decisions of Interest

28 August 2023 – 10 September 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

Consumer Law: unacceptable quality

***Dwyer v Volkswagen Group Australia Pty Ltd* [2023] NSWCA 211**

Decision date: 5 September 2023

Gleeson, Leeming and White JJA

Volkswagen Australia (VW) supplied vehicles, which were manufactured in Germany, to consumers in Australia. The vehicles were fitted with airbags manufactured by Takata Corporation or its related entities (Takata). In 2018, VW initiated a recall program of its models in Australia containing certain Takata airbags and progressively replaced the airbags in those vehicles, at no cost. Prof Dwyer commenced representative proceedings against VW, claiming that his vehicle did not comply with the consumer guarantee of "acceptable quality" in s 54 of the *Australian Consumer Law* (ACL). He claimed that the use of a certain propellant (PSAN) in the Takata airbags created a risk that was present at the time of purchase. The risk was said to arise because PSAN has a propensity to degrade over time which could lead to the inflator rupturing in a life-threatening way. Damages under s 272 of the ACL were sought for any reduction in the value of the vehicles resulting from the failure to comply with the consumer guarantee and for consequential loss. The primary judge rejected the appellant's claim.

Held: dismissing the appeal

- Unacceptable quality may be found on the basis of an inherent risk associated with a product without that risk having materialised. However, it must be established that the product carries the inherent risk alleged: [146]. In this case, it was not proven that the airbags in the VW Vehicles carried the inherent risk alleged because it was not proved that degradation would reach a point of functional significance at any identifiable point in time: [100], [147]-[148], [153]. Therefore, there was no breach of the acceptable quality guarantee under s 54 of the ACL: [151], [154]-[156].

- The manufacturer's defence in s 271(2)(a) directs attention to the facts which made the goods of unacceptable quality. If the sole cause of what made the goods non-compliant with s 54 is an act, default or omission of a third party supplier of a component of the goods who is not the agent of the manufacturer, the defence applies: [172]-[186]. Section 271(2)(a) applies to both the actual manufacturer of the vehicles located overseas and the importer of the vehicle at a time when the actual manufacturer did not have a place of business in Australia: [176]-[182].

- It is appropriate to draw upon general law notions of compensation, by way of analogy, when assessing statutory damages under s 272(1): [227], [230]-[232], [240]. Subsequent events which indicate the true value of the good, at the time of supply, may be taken into account under s 272(1)(a) when assessing any reduction in value, at the time of supply. However, subsequent events as a consequence of independent factors must not be taken into account: [225]-[234], [237]-[239]. The primary judge was entitled to take into account the replacement of the airbag, at no cost, when assessing damage for any reduction in value of the appellant's vehicle, at the time of supply, under s 272(1)(a): [245], [255], [260]-[261], [282]-[283].

Negligence: duty of care; Workers Compensation

Synergy Scaffolding Services Pty Ltd v Alelaimat **[2023] NSWCA 213**

Decision date: 7 September 2023

Meagher and Kirk JJA and Simpson AJA

In 2012, Mr Alelaimat was instructed by a member of Synergy Scaffolding to assist in dismantling scaffolding. In doing this, Mr Alelaimat was seriously injured by a falling piece of metal scaffolding. Mr Alelaimat was employed by DJ's Scaffolding Services Pty Ltd ("DJSS"), but mistakenly believed that he was employed by Synergy Scaffolding. Mr Alelaimat was paid compensation pursuant to the *Workers Compensation Act 1987* (NSW). Synergy Scaffolding pleaded that Mr Alelaimat's claim was barred by s 50C of the *Limitation Act 1969* (NSW) and that any damages payable to Mr Alelaimat should be reduced under s 151Z(2)(c) of the *Workers Compensation Act*. The primary judge held that the claim was not barred by the *Limitation Act*, upheld the claim and awarded substantial damages.

Held: allowing the appeal in part

- To know that an injury was "caused by the fault of the defendant" for the purposes of s 50D(1)(b) of the *Limitation Act*, it is enough that the plaintiff knows that the circumstances of the injury are such that legal liability could be established. Mr Alelaimat's mistaken belief that he was employed by Synergy Scaffolding, rather than DJSS, was not material to the s 50D(1)(b) inquiry: [80]. Mr Alelaimat's ignorance as to his true employer was material to whether he knew that his injury was sufficiently serious to justify the bringing of an action on the cause of action, for the purposes of s 50D(1)(c): [84]. Accordingly, Mr Alelaimat did not have the knowledge required by s 50D(1)(c): [84]-[86].

- Where an employer is a labour-hire company, the duty to take reasonable care to provide a safe system of work for its employees will be breached by injury negligently inflicted by a client to whom the employer has contracted the services of the employee: [95], [102], [106], [109].

- Under s 151Z(2)(c) of the *Workers Compensation Act*, where a worker has a cause of action for damages against both employer and a third party tortfeasor, the damages recoverable from the third party equals the total damages which would be recoverable from the third party but for s 151Z(2), minus the difference between the sum that the third party would be entitled to recover from the employer under s 5 of the 1946 *Miscellaneous Provisions Act* but for the operation of s 151Z(2)(d), and the amount of contribution that is recoverable once s 151Z(2)(d) is taken into account: [139]-[140].

- Where a worker's employer is a tortfeasor liable to pay the worker damages, s 151Z(2)(e) applies s 151Z(1) "as if" the employer was not a tortfeasor, provided that the worker either "does not take proceedings against that employer", or "does not accept satisfaction of the judgment against that employer": [91], [169], [170]. In these circumstances, s 151Z(1) does not apply.

Licensing: gaming machine entitlements

***Independent Liquor & Gaming Authority v 4 Boys (NSW) Pty Ltd* [2023] NSWCA 210**

Decision date: 7 September 2023

Meagher and Beech-Jones JJA and Basten AJA

4 Boys, applied under s 34 of the *Gaming Machines Act 2001* (NSW) (the Act) to the Authority to increase the gaming machine threshold for a tavern from 20 to 24. Its application was accompanied by a class 1 "Local Impact Assessment" (LIA), as required by s 35(3)(b), which offered a contribution to the Responsible Gambling Fund. The Authority approved the application, subject to a condition relating to the LIA. 4 Boys then purchased a second tavern. 4 Boys applied for permission to transfer one GME from the second tavern to the first without increasing the latter's threshold. The respondent also applied for permission to transfer six GMEs from the second tavern to the first, and to increase the latter's threshold from 24 to 27. The Authority approved both applications. 4 Boys then requested that the Authority revoke both decisions. The Authority refused the application on the basis that it did not have the power to revoke its approval.

Held: granting leave to appeal but dismissing the appeal

- Section 48(1) of the *Interpretation Act 1987* (NSW) does not mean that, subject to any contrary intention, a power to revoke a previous exercise of that function should be implied into every relevant function: [98], [100]. There is a difference between a fresh exercise of a power, even if it "reverses" an earlier order, and implying into every power a power to rescind an earlier order. *Parkes Rural Distributions Pty Ltd v Glasson* (1986) 7 NSWLR 332 is not authority for the proposition that either s 32 or s 48 of the *Interpretation Act 1897* (NSW) is a basis for implying a power of revocation into every statutory function or power to which it applies: [78]−[80], [87]. Subsection 19(2)(a) of the Act does not confer a power on the Authority to revoke an earlier approval of a transfer of GMEs, nor does s 34(4) confer a power to revoke an earlier approval of an increase in the gaming machine threshold: [110], [113].

- Regardless, the Act manifests a contrary intention in relation to the power to approve the transfer of a GME or an increase in the threshold. A purported revocation of the power to approve a transfer of a GME could not undo the consequences of that approval. The implication of a power to revoke an approval of an increase in the threshold is inconsistent with various express provisions of the Act that specify the circumstances in which a decrease in the threshold may occur: [111], [113]−[114].

- The power to "set" the gaming machine threshold conferred by s 32(1) of the Act cannot be re-exercised from time to time to permit an increase or decrease in the threshold. The Act specifically addresses the circumstances in which the threshold may be increased or otherwise varied: [117], [119]−[120].

Equity: fiduciary duty

Jaken Properties Australia Pty Ltd v Naaman **[2023] NSWCA 214**

Decision date: 8 September 2023

Bell CJ, Leeming and Kirk JJA

Jaken is the trustee of the Sly Fox Family Trust. Jaken replaced the former trustee, Jaken Property Group Pty Ltd (JPG). The second to seventh appellants are persons and companies associated with Jaken. Mr Naaman is a judgment creditor of JPG in the amount of $3,446,755.55. He was subrogated to the rights of JPG to be indemnified out of trust assets for liabilities incurred by it, including the judgment debt. It is likely that there will be insufficient trust assets to satisfy Mr Naaman's judgment debt. Mr Naaman claimed that Jaken had transferred trust assets to other parties in breach of a fiduciary duty owed by Jaken to JPG, in breach of certain asset preservation orders, and in order to defraud creditors. The primary judge answered numerous questions concerning the transfers of the assets, including whether they had been transferred in breach of fiduciary duty, whether other appellants had knowingly received or assisted in the transfers, whether the transfers had been contrary to a court order preventing any further encumbering or diminishing the value of the certain property, or for the purpose of defrauding creditors. Most were answered unfavourably to the appellants. The National Australia Bank, which was a secured lender to Jaken and had security over some of the assets held by other appellants, was not a party to these proceedings. After the primary judge reserved, the bank appointed a receiver to one of the trust properties.

Held: granting leave to appeal and allowing the appeal in part

- The successor trustee did not owe the former trustee a fiduciary obligation, either at the time it was appointed, or from the time it learnt of the former trustee's claim to be indemnified out of trust assets, or at any other time: [115]-[141]; [228]-[237]. In dissent, Bell CJ considered the nature of the former trustee's entitlement to trust assets, the nature of fiduciary obligations and the circumstances when they are imposed, the significance of vulnerability, the analogies with a bailee and a mortgagee with a surplus after exercise of a power of sale, the analogy of a bailor, and the relationship between the obligation owed to a former trustee and to current beneficiaries: [3]-[33].

- There was no error in the findings that the Granville Land and the Victorian Properties had been transferred in order to defraud creditors: [146]-[160]. The "$3.6 Million Drawdown" did not contravene the asset preservation order, because there was no further encumbering or diminishing the value of the property over which security had already been given when Jaken increased its indebtedness and another company reduced its indebtedness: [193]-[205]. No finding that the transactions comprising the "$3.6 Million Drawdown" was void by reason of s 37A of the Conveyancing Act should be made in proceedings to which the bank was not a party: [217].

Australian Intermediate Appellate Decisions of Interest

Companies: insolvency; voluntary administration

Australian Securities and Investments Commission v Jones **[2023] WASCA 130**

Decision date: 1 September 2023

Buss P, Mitchell and Beech JJA

The respondents are insolvency practitioners who were partners of the firm Ferrier Hodgson. They were appointed as voluntary administrators of two companies (the Companies). Following a series of transactions, ASIC expressed a concern that, due to Ferrier Hodgson's pre-administration dealings with the Companies, the respondents may have placed themselves into an actual or perceived conflict of interest and duty by accepting the appointment as administrators. The respondents continued with various transactions, including selling the Companies' assets and business, after which the Companies ceased operating. The creditors resolved to wind up the Companies. Pursuant to an agreement with ASIC, alternative liquidators were approved and the respondents agreed not to draw down on the renumeration which was approved by the creditors unless an application to the court was made. The correspondence between ASIC and the respondents was included in the notice of meeting.

Held: granting leave to appeal but dismissing the appeal

- At the time of their appointment as administrators, there was a real, sensible possibility that the respondents' interest in avoiding any disgorgement of the payment to Ferrier Hodgson might influence them in discharging their duties of investigating and reporting on potential recoveries of voidable transactions. Further, when the respondents were appointed administrators, a fair-minded lay observer might reasonably have thought that they might not bring an impartial mind to investigating and reporting on potential voidable transactions in a winding up of the Companies: [17], [254], [258].
- Ferrier Hodgson's advice given in relation to the payment to Weston Milling did not give rise to any real, sensible possibility of a conflict of interest or any reasonable apprehension of bias: [18], [266]-[269]. It was open to the primary judge to proceed on the basis that ASIC's case as to restructuring work was founded on the alleged substantial involvement: [19]-[20], [276]-[278].
- As a matter of construction of the sch 2 of the *Corporations Act 2001* (Cth) (*Insolvency Practice Schedule (Corporations)*), a court does have a discretion to review an external administrator's remuneration in respect of work which the administrator should not have done by reason of conflict of interest or apprehension of bias: [21], [297]-[313].

Asia Pacific Decision of Interest

Constitutional Law

Speaker of Parliament of the Republic of Vanuatu v Weibur **[2023] VUCA 52**

Decision date: 4 September 2023

Court: The Court of Appeal of the Republic of Vanuatu

Lunabek CJ and Robertson, Mansfield, Saksak, Aru and Trief JJ

The respondents are all elected members of Parliament. There were 52 members elected, in accordance with art 17 of the *Constitution*, and the Presidential Order 4 of 2002, under the *Representation of the People Act* [CAP. 146]. Article 17 does not set out the number of members. Following the election, one of the elected members had his seat vacated and his election was declared void by the Supreme Court. As a result, there are only 51 elected members of Parliament. A request was made to convene Parliament to entertain a motion of no confidence in the Prime Minister. There were 26 votes in favour of the motion, 23 votes against the motion, one abstention, and the Speaker did not vote. The Speaker ruled that the motion was lost because it was not supported by an absolute majority, because the election had been for 52 members such that an absolute majority required 27 votes. The first respondents considered that, as there were only 51 elected members at the time, an absolute majority was 26. The primary judge found that the vote of no confidence had been passed in accordance with Article 43(2) of the *Constitution*.

Held: dismissing the appeal

- The decision of *Kilman v Speaker of Parliament of the Republic of Vanuatu* [2011] VUSC 35 should be distinguished as it concerned circumstances in which there were 52 members of Parliament with no vacancies, such that the application of the principles to the facts was straightforward: [15]-[16].
- The words “members of Parliament” in Article 43(2) refer to the currently elected members of Parliament, being 51 rather than 52 persons. The fact that art 17(1) commences with the words: “Parliament shall consist of members elected on the basis of universal franchise...” does not mean that there must always be 52 elected members of parliament. While art 17 contemplates that the number as fixed by the process of election will routinely be (at present) 52, it does not operate on the presumption that at all times and in all circumstances, there must be 52 elected members of Parliament: [18].
- The use of the word ‘absolute’ in Article 43(2) is not a word which conveys that requirement. It is descriptive of the voting requirement to support any motion of no confidence in the Prime Minister. It is to be applied against the number of the members of Parliament. Where, as here, at the time there were 51 members of Parliament, the absolute majority was reached by 26 votes, as there were 51 eligible votes and 26 is in excess of the absolute majority: [19]-[23].

Resource Consent; Expert Panels

***Panel Convener v Ngāti Paoa Trust Board* [2023] NZCA 412**

Decision date: 1 September 2023

Court: Court of Appeal of New Zealand

French, Miller and Brown JJ

The Ngāti Paoa Trust Board, was the only iwi authority to nominate a member (Mr Gardener-Hopkins) of an expert panel to decide a fast-track application for resource consent, established under the now-repealed *COVID-19 Recovery (Fast-track Consenting) Act 2020* (NZ) (FTCA). The Panel Convener, who was responsible for appointing panel members, declined to appoint Mr Gardener-Hopkins on the basis that he is serving a three-year suspension from practice as a lawyer due to professional misconduct. The Board sought judicial review of that decision. The Board maintains that the panel is unlawful (because it lacks an iwi representative and one was nominated), but the only relief sought was a declaration that the decision not to appoint him was unlawful. The primary judge accepted that character and integrity were relevant considerations, but held that the suspension from legal practice was an irrelevant consideration. He quashed the decision.

Held: allowing the appeal

- The Convener was entitled to consider the past misconduct when deciding whether to appoint Mr Gardner-Hopkins, despite there being no suggestion of a risk that Mr Gardner-Hopkins will engage in misconduct as a panel member: [31], [41]-[42]. The possibility that others might refuse to work with Mr Gardner-Hopkins, due to fears that he will engage in similar conduct or distaste for his past conduct, would be a relevant consideration if there was a real risk that others would respond in that way: [43].

- The Convener was entitled to reject Mr Gardner-Hopkins's nomination on the ground that the appointment of a lawyer who is still serving a suspension for professional misconduct might shake public confidence in the panel and the processes for appointing panel members. The public might reasonably wonder why a person who has yet to complete a period of suspension to re-establish his fitness to practise law is a suitable appointee to a quasi-judicial body which performs important public functions and needs a high degree of public confidence. The Convener might reasonably think the risk of controversy was high having regard to the seriousness of the misconduct and the publicity which had attended the disciplinary proceeding: [44]-[45].

- However, the primary judge erred in substituting his own assessment for that of the Convener and in attaching too much significance to the fact that the suspension did not prevent him from working as a consultant in the resource management field: [46]-[47].

- The right to nominate panel members recognises the mana of iwi authorities and the nomination was seen as an exercise of mana. We also accept that the Board was entitled to respect for its view that Mr Gardner-Hopkins possesses expertise in tikanga and mātauranga Māori. The right to participate in appointments is distinct from the other ways in which the FTCA accommodates Treaty principles: [48]. An iwi authority does not have a right under the FTCA to have its nominee appointed. The legislation envisages rather that a number of relevant iwi authorities may offer nominations and the convener will choose among the nominees according to their personal attributes and expertise, while maximising the efficiency of the decision making process: [49].

Human Rights; Constitutional Law

Sham Tsz Kit v Secretary for Justice **[2023] HKCFA 28**

Decision date: 5 September 2023

Court: Hong Kong Court of Final Appeal

Cheung CJ, Ribeiro PJ, Fok PJ, Lam PJ and Keane NPJ

The appellant entered into a same-sex marriage in New York with his partner. In Hong Kong, same-sex marriages cannot be entered into and such marriages entered into overseas are not recognised. The appellant commenced proceedings for judicial review regarding whether he has a constitutional right to same-sex marriage under art 25 of the Basic Law ("BL25") and art 22 of the Hong Kong Bill of Rights ("BOR22"); alternatively, whether the absence of any alternative means of legal recognition of same-sex relationship constitutes a violation of BOR14 and/or BL25 and BOR 22; and whether the non-recognition of foreign same-sex marriage constitutes a violation of BL25 and BOR22.

Held: appeal allowed in part

- The constitutional freedom of marriage under BL37 and BOR19(2) is confined to opposite-sex marriage. BL37, when read with BOR19(2), is the *lex specialis* of the right to marry, which confines that constitutional right to opposite-sex marriage and excludes same-sex marriage. Therefore, the equality rights under BL25 and BOR22 do not confer a constitutional right to same-sex marriage or to recognition of foreign same-sex marriage: [9]-[13], [120]-[124], [216].

- Under Hong Kong law, the appellant lacked capacity to enter into a same-sex marriage. Therefore, an assertion that equality rights under BL25 and BOR22 compel recognition of the Appellant's foreign same sex marriage amounts to a challenge to the appellant's lack of capacity to enter into a same-sex marriage under BL37 and BOR19(2), which fails due to *lex specialis*: [76], [124], [216].

- By majority, the Court accepted that the right to privacy under BOR14 is infringed by the arbitrary interference with the private life of same-sex couples resulting from the difficulties faced by them in their private lives, and litigation. These circumstances do not involve the conferment of the rights and obligations mirroring those of a marriage, such that the establishment of an alternative legal framework is not excluded by operation of *lex specialis*. The Government enjoys a flexible margin of discretion in deciding the content of the rights and obligations to be associated with the legal recognition of same-sex marriage: [151]-[152], [194], [213]. In dissent, Cheung CJ and Lam PJ considered that the argument based on equality was equivalent to asking for same-sex marriage in another name: [65]-[68], [74]-[75]. On privacy, Cheung CJ distinguished between the prevention of interferences and a positive duty to enact laws to "ensure effective respect for" rights in the absence of interferences: [225], [227], [251].