Decisions of Interest

11 September 2023 – 24 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.

Contents

New South Wales Court of Appeal Decisions of Interest

Administrative Law; Building and Construction

Ceerose Pty Ltd v A-Civil Aust Pty Ltd **[2023] NSWCA 215**

Decision date: 12 September 2023

Ward ACJ, Payne JA and Basten AJA

Ceerose is a building contractor undertaking developments at both York Street and in Elizabeth Bay. A-Civil was Ceerose's subcontractor for both developments. A-Civil served Ceerose with payment claims under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("the Act"). Ceerose disputed some of the claims. A-Civil applied for adjudication and the second respondent, Mr Tuhtan, was appointed adjudicator. For the York Street dispute, Mr Tuhtan determined that Ceerose was obliged to pay A-Civil $2,045,453.97, and for the Elizabeth Bay dispute, $349,324.36. The primary judge held that both determinations were affected by jurisdictional error but, under s 32A of the Act, set aside only the parts of the determinations said to be affected by jurisdictional error.

Held: dismissing the appeals and allowing the cross-appeals

- Section 22(2) of the Act lists the "only" matters the adjudicator is "to consider". Failure to refer to a matter in the adjudicator's written decision does not necessarily show the adjudicator failed to consider it: [51], [54]-[68], [175]. Under s 22(2), the adjudicator must "consider" only those submissions that are "duly made": [52]-[53]. Only in a rare case will it be possible to infer that an adjudicator has failed to consider a matter within s 22(2): [69], [81]-[82].

- The adjudicator's task is to decide the dispute on the limited matters the Act requires the adjudicator to consider and the limited material the Act allows the parties to submit: [76]-[77], [79]. Section 20(2B) limits the respondent in an adjudication to resisting payment only on those grounds already included in their payment schedule: [76]-[77]. If a respondent gives no reason for resisting payment, it is not an error to award the payment claimed without further investigation: [82]. The same applies if the adjudicator rejects a respondent's reasons for resisting payment: [73]-[75], [83]-[86].

- When applying s 32A(2) to a decision affected by jurisdictional error, the correct approach is to sever and set aside those parts of the decision concerning whatever component of payment was in dispute. The decision should be confirmed insofar as it also awarded components of payment that the respondent agreed or did not dispute were payable: [96]-[98], [104].

- The "decision" referred to be set aside or confirmed under s 32A(1) or (2) is the adjudicator's decision about the amount of the progress payment to be paid, the date upon which it becomes due and payable, and the rate of interest. Section 32A does not require that the adjudicator's reasons be set aside: [111]-[112].

- An adjudication determination affected by legal error is not necessarily void for all purposes: [129]-[133]. The adjudicator is entitled to be paid for adjudicating an adjudication application whether or not the adjudication was invalid: [132], [134]-[139]. An adjudicator's decision on apportioning costs, including his fees and expenses, could in principle be affected by jurisdictional error: [187].

Legal Practitioners: barristers; fit and proper persons

Picos v Council of the New South Wales Bar Association **[2023] NSWCA 218**

Decision date: 13 September 2023

Gleeson, Leeming and Payne JJA

Ms Picos had held a practising certificate issued by the Law Society Council of New South Wales. She applied to the NSW Bar Association for the grant of an Australian practising certificate as a barrister. Following a request by the Bar Council that she attend a medical examination by a psychiatrist, Ms Picos commenced proceedings against the Bar Council (2019 proceedings). Her application was refused. Ms Picos withdrew that application for the grant of a barrister's practising certificate. She then made a second application to the Bar Association which was refused on the basis that Ms Picos is not a fit and proper person to hold a practising certificate. Ms Picos sought leave to file an amended summons in the 2019 proceedings seeking additional interim and final relief. Ms Picos did not exercise the right of review of the Bar Council's decision under s 100(1) of the *Uniform Law*. The amended summons was dismissed by Kunc J. In April 2023 Ms Picos applied for leave to appeal against those orders. She also filed a summons seeking judicial review of the Bar Council's decision of that she is not a fit and proper person. By a notice of motion, Ms Picos also sought to vary or discharge the orders made by Kirk JA, dismissing Ms Picos' challenge to case management orders made by the Registrar

Held: dismissing the applications for leave to appeal, judicial review and review

- The Law Society Council's decision to renew Ms Picos' practising certificate as a solicitor did not constrain the discretionary power of the Bar Council under s 44(1) of the *Uniform Law* to grant Ms Picos an Australian practising certificate as a barrister, nor the obligation imposed on the Bar Council by s 45(2) of the *Uniform Law* not to grant Ms Picos an Australian practising certificate as a barrister if the Bar Council concluded that she was not a fit and proper person to hold such a certificate: [55]. There was no denial of procedural fairness in Kunc J dismissing the summons in the 2019 proceedings following the Bar Council's oral application to have the summons struck out or dismissed: [62]-[67].

- There was no jurisdictional error in the exercise of the Bar Council's power to refuse Ms Picos' application for a practising certificate: [78]-[87]. No denial of procedural fairness resulted from the Bar Council's medical expert changing his view as to Ms Picos' fitness to practise without reassessing her. She had an opportunity to respond to the Bar Council's expert's reports: [85], [87].

- Kirk JA did not err in deciding that the declaratory relief sought by Ms Picos, in her motion that she be declared a fit and proper person, was misconceived because that relief related to proceedings that were separate and subsequent to the proceedings in issue: [103]-[104]. Kirk JA did not err in not setting aside the Registrar's orders because the Court lacked a power to grant certiorari in respect of a decision a judge of the Supreme Court: [105].

Commerce: restraint of trade; Contracts: equitable remedies

***Creak v Ford Motor Company of Australia Ltd* [2023] NSWCA 217**

Decision date: 13 September 2023

Gleeson, Kirk and White JJA

Mr Creak, through Tallevine Pty Ltd ("Tallevine") (of which he was the sole director and shareholder), conducted an authorised Ford dealership under a Dealership Agreement with Ford. Tallevine advertised, distributed, supplied, and sold various Ford vehicles, including those that it had "raptorised" (altered to resemble Ford vehicles sold in the United States). After Ford terminated the Dealership agreement, Tallevine continued to represent that it enjoyed a business relationship with Ford and to sell "raptorise" vehicles. Mr Creak, Tallevine, and Ford entered into a deed of settlement ("Deed"). Mr Creak also undertook that neither he, nor any "related entities" would engage in the conduct proscribed by the minutes to the Deed. Mr Creak continued to engage in proscribed conduct, both through Tallevine and another company controlled by Mr Creak, Fleet Serv. In the primary proceedings, brought against Tallevine and Mr Creak, Ford contended that Mr Creak had breached his undertaking in cl 2.2(a) of the Deed. Mr Creak contended that his raptorisation of Ford's vehicles was done in good faith (thus falling within an exemptive provision in the minutes, cl 10(b)), and that cl 2.2(a) of the Deed was void as being in restraint of trade. Mr Creak also asserted that cl 2.2(a) was a bare warranty that the facts described therein would be in existence in the future.

Held: allowing the appeal in part

- The restraint of trade doctrine did not operate to void cl 2.2(a) of the Deed, as the restraints were reasonable as between the parties and not contrary to the public interest: [17]-[31]. Where a restraint of trade is imposed by a deed of settlement, entered into with the benefit of legal advice, and represents a genuine and proper compromise of an actual or anticipated dispute between the parties, the evidentiary onus shifts to the covenantee to establish that the restraint is void: [98]-[113], [124].

- The good faith use exception in order 10(b) of the minutes should not be limited to the preservation of good faith use of trade marks permitted by ss 120 and 122 of the *Trade Marks Act 1995* (Cth). However, the appellant's raptorisation of Ford's vehicles was not within conduct permitted by order 10(b): [84]-[91].

- Clause 2.2(a) was clearly worded as an undertaking to refrain, and to cause others to refrain, from the conduct proscribed by the minutes to the Deed. As a negative promise, cl 2.2(a) was enforceable by injunction: [92]-[95]. The primary judge did not err in issuing mandatory injunctions compelling Mr Creak to carry out actions that Tallevine had been obliged to perform pursuant to the consent orders as the relief remedied Tallevine's and Fleet Serv's breaches of those obligations at Mr Creak's behest: [129]-[136].

- The primary judge's recourse to costs orders entered in previous proceedings between the parties in order to quantify the extent of Mr Creak's obligation to indemnify Ford was erroneous. Such recourse was inconsistent with the prohibition contained in s 91(1) of the *Evidence Act 1995* (NSW): [157]-[167].

Administrative Law: gambling machine entitlements

Independent Liquor and Gaming Authority v Whitebull HTL Pty Ltd; Independent Liquor and Gaming Authority v Area Hotel UT Pty Ltd; Independent Liquor and Gaming Authority v The Griffith Hotel Pty Ltd **[2023] NSWCA 224**

Decision date: 20 September 2023

Meagher and Kirk JJA and Griffiths AJA

The respondents run hotels and have gaming machines entitlements (GMEs) to operate gaming machines within their permitted gaming machine threshold (GMT) under the *Gaming Machines Act 2001* (NSW) (GM Act). They sought approvals from the Authority for transfer or lease of GMEs, under ss 19 and 25 of the GM Act, and for an increase in their GMT, under s 34(4) of the Act. The Authority approved the transfer and lease, but imposed conditions on the liquor licence of the relevant hotel to mitigate harm, under s 53 of the *Liquor Act 2007* (NSW). The Authority declined to approve the increase in GMT, as the relevant hotel refused to accept similar conditions. The hotels sought to challenge those decisions.

Held: allowing the appeal

- The primary judge erred in making declarations as to the construction of the GM Act as it is undesirable to make such declarations in cases of this kind: [35]. The primary judge also erred in ordering that the Authority grant the approval sought as such an order should not be made where the decision-maker has some discretion: [36].
- The Authority's powers under ss 19, 25 and 34(4) of the GM Act are discretionary, without express qualification as to what may be taken into account: [75]-[78], [90], [93]. When considering the objects of the Act and the Act as a whole, there is no basis reading down the powers to exclude considerations of harm minimisation concerns, particularly in light of the objects of the Act as stated in s 3: [89], [99]-[102].
- Harm minimisation relating to use of gaming machines is a permissible consideration under s 53. Section 53(1) grants the Authority a discretionary power to impose conditions on a liquor licence at any time: [108]. Several provisions in the legislation envisage that concerns about the community impact of gambling activities may be relevant to certain licensing decisions under the *Liquor Act*: [114]-[126]. The Authority is also required, when exercising its functions under the *Liquor Act*, to have regard to the need to ensure that the operation of licensed hotels and clubs does not detract from the amenity of community life. Social harm from the operation of gaming machines could detract from that amenity: [131]. The *Liquor Act* and the GM Act are symbiotic: [134].

Australian Intermediate Appellate Decisions of Interest

Practitioners: professional misconduct; Reasonable Apprehension of Bias

Goldsmith v Legal Services and Complaints Committee [2023] WASCA 136

Decision date: 21 September 2023

Mazza, Mitchell and Vaughan JJA

The State Administrative Tribunal found that Mr Goldsmith had engaged in professional misconduct and unsatisfactory professional conduct. The findings of professional misconduct arose from Mr Goldsmith engaging a barrister to appear on a client's behalf and then failing to pay the barrister's fees, complaining to the bar association about the barrister without a reasonable basis, making false statements in proceedings, and seeking to include at settlement a term that the barrister withdraw his complaint to the respondent's predecessor. The findings of unsatisfactory professional conduct arose from Mr Goldsmith seeking to engage the barrister in further proceedings despite the ongoing dispute.

Held: allowing the appeal

- The prior association between the Deputy President and the complainant was such as to give rise to a reasonable apprehension that the Deputy President might have preconceived views as to the complainant's honesty and reliability formed during a long association as members of a board of directors. A fair-minded properly informed observer might apprehend that those preconceived views might, consciously or unconsciously, deflect the Deputy President from assessing the credibility and reliability of the complainant's evidence based only on an assessment of the evidence given in the Tribunal. That reasonable apprehension would arise in proceedings which were likely to, and did in fact, largely turn on an assessment of the credibility and reliability of the complainant's and appellant's conflicting evidence: [8]-[11], [25]-[26], [31]-[33].
- Not every incidental association with the subjects of or witnesses in proceedings with prevent a Tribunal member from dealing with a matter involving a practitioner who is known to them to some extent. The question is one of fact and degree. In considering whether a previous connection with a participant in the proceedings gives rise to a reasonable apprehension of bias, it is relevant to consider all features of the connection, including the nature, duration, intensity and proximity of the association between the judge and the participant: [23].
- It is not necessary for a party said to waive the right to object on grounds of apprehended bias based on past association to be aware of every detail of the relationship. However, they must at least be aware of circumstances which would be sufficient to ground a proper objection: [41], [44]-[47], [72]-[74]. The fact that the relevant circumstances could be discovered following a search of publicly available information does not give rise to waiver: [48].

Workers Compensation: psychiatric injury; multiple accidents

Metro Trains Melbourne Pty Ltd v Keay [2023] VSCA 223

Decision date: 15 September 2023

Beach JA, Forrest and Tsalamandris AJJA

For ten years, Mr Keay was employed by Metro Trains Melbourne Pty Ltd as a train driver. In the course of that employment, he sustained a psychiatric injury as a result of being involved in a series of traumatic incidents. Mr Keay commenced proceedings against the Transport Accident Commission ("the TAC") seeking leave, pursuant to s 93(4)(d) of the *Transport Accident Act 1986* (Vic) ("TA Act"), to commence a proceeding for the recovery of common law damages in respect of a psychiatric injury suffered as a result of a transport accident on 17 November 2014 ("the TAC proceeding"). The judge invited Mr Keay to consider whether he ought to proceed with the application or whether he should make an application under the *Accident Compensation Act 1985* (Vic) ("the AC Act") in respect of the cumulative impact on him of all of the traumatic incidents in which he had been involved during the course of his employment. Mr Keay chose to pursue the latter.

Held: allowing the appeal

- Under s 326 of the *Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)* ("WIRC Act") is that if a work-related injury is suffered "as a result of a transport accident", common law damages can only be sought under s 93(4) of the TA Act, not s 335 of the WIRC Act: [35], [38], [40], [43].

- Section 93 of the TA Act does not permit a person to aggregate injuries over multiple transport accidents, or to make a claim for a "gradual process injury" caused by multiple transport accidents notwithstanding the undoubted ability of a worker to make a serious injury application in respect of a gradual process injury which did not result from any transport accident, under either s 134AB(16)(b) of the AC Act or s 335(2)(d) of the WIRC Act: [37].

- *Belgrave Heights Christian School v Moore* [2020] VSCA 240 does not provide support for the proposition that an injured worker who suffers a psychiatric injury as a result of multiple transport accidents, that occurred in the course of that worker's employment, is entitled to make a serious injury application under s 335(2)(d) of the WIRC Act: [41].

- A construction of s 326 of the WIRC Act which requires the plaintiff to make separate applications under s 93(4)(d) of the TA Act does not lead to anomalous or unfair results such that this Court should prefer a construction which is contrary to the statutory text: [42].

- It was not open to Mr Keay to make a serious injury application under s 134AB(16)(b) of the AC Act. Each of the incidents that had given rise to the psychiatric injury was a transport accident and any applications made must be made in accordance with the provisions of the TA Act: [44].

Asia Pacific Decision of Interest

Contract; Tenders

BTL EPC Ltd v Macawber Beekay Pvt Ltd **[2023] INSC 864**

Decision date: 18 September 2023

Court: Supreme Court of India

Hon'ble the Chief Justice, Hon'ble Mr Justice Pardiwala, Hon'ble Mr Justice Misra

Bharat Heavy Electricals Limited ("BHEL") was awarded a contract for setting up a power station. Part of the work was to be subcontracted. BHEL invited bids for undertaking various works relating to an Ash Handling Plant (AHP). BTL submitted a bid. A letter of intent was issued to BTL for a contract value of Rs 378.64 crores. A dispute arose regarding the pre-qualification requirement for bidders notified by BHEL. Clause 01.01.01 stated that bidders must have executed at least one AHP with various systems which were successfully operated for at least a year. Clause 01.01.02 included exceptions to cl 01.01.01. Clause 01.01.03 required that activities relating to the project requirements in cl 01.01.01 must have been undertaken directly by the bidder. BTL entered into a consortium agreement with Fujian Longking Company Limited, in accordance with cl 01.01.01. The Public Procurement Division in the Department of Expenditure of the Union Ministry of Finance issued an Order imposing certain restrictions under Rule 144(xi) of the *General Financial Rules 2017* (OM), whereby a prospective bidder from a country that shares a land border with India, would be eligible to bid if certain registration requirements were met. Macawber, another bidder, commenced proceedings under art 226 of the Constitution on the basis that the award of the contract to BTL was in beach of the OM as Fujian had not fulfilled the registration requirements.

Held: allowing the appeals

- The OM was subsequently relaxed such that the registration requirements did not apply to the procurement of goods and services: [24], [31]. Clause 01.01.01 required that BTL have a consortium requirement with a company that satisfied the technical requirements as it did not itself satisfy all the requirements: [31].
- It is relevant that the only challenge to the eligibility of BTL to bid was brought by a rival bidder and the bid submitted by BTL was significantly lower than that submitted by Macawber: [28]. The primary decision as to whether BTL met the technical requirements of the tender had to be made by BHEL, which did not find that there was a breach of the OM as the bid was made by BTL as a standalone entity, as opposed to by a bidding consortium with Fujian. The bid was approved BHEL following an period of due diligence and consideration in relation to BTL: [33]. As this contract involved complex technical issues, the Court should exercise restraint and not readily interfere but rather defer to the discretion of the tender inviting authority: [35]-[37].

International Decision of Interest

Arbitration

Republic of Mozambique (acting through its Attorney General) v Privinvest Shipbuilding SAL (Holding) and others [2023] UKSC 32

Decision date: 20 September 2023

Court: United Kingdom Supreme Court

Lord Hodge, Lord Lloyd-Jones, Lord Hamblen, Lord Leggatt and Lord Richards

Three corporate vehicles ("SPVs") owned by Mozambique entered into supply contracts ("Contracts") with three of the "Privinvest companies". The Contracts are governed by Swiss law. Two of the Contracts provide for dispute resolution by arbitration of "all disputes arising in connection with" the relevant project governed by the Contract. The third provides for dispute resolution by arbitration of "any dispute, controversy or claim arising out of, or in relation to" the relevant Contract (the "arbitration agreements"). The SPVs borrowed the purchase funds from various banks, and Mozambique granted sovereign guarantees (the "Guarantees") which are governed by English law and provide for dispute resolution in the courts of England and Wales. A dispute arose, leading to a preliminary question as to whether Mozambique's claims were "matters" which fell within the scope of the arbitration agreements under s 9 of the *Arbitration Act 1996* (UK).

Held: allowing the appeal

- As s 9 of the 1996 Act gives effect to art II(3) of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the "New York Convention"), other countries' jurisprudence regarding similarly worded provisions are relevant: [53]-[55]. English law adopts a pro-arbitration approach: [45]-[47]. The following criteria can be ascertained to be relevant in determining which "matters" must be referred to arbitration: [49]-[52], [56]-[71]. First, the court will adopt a two-stage test identifying the matters that have been raised or foreseeably will be raised in the court proceedings, and determining whether those matters fall within the scope of the arbitration agreement: [48], [72]-[73]. Secondly, the "matter" need not encompass the whole of the dispute between the parties: [74]. Thirdly, a "matter" is a substantial issue that is legally relevant to a claim or a defence which is susceptible to determination by an arbitrator as a discrete dispute: [75]-[76]. Fourthly, the test entails the application of common sense: [77]. Fifth, the court must recognise a party's autonomy to choose which of several claims it wishes to advance: [78]-[80].
- The scope of each of the arbitration agreements is a matter of construction, governed by Swiss law: [99]. The court, in ascertaining the scope of an arbitration agreement, must have regard to what rational businesspeople would contemplate: [103]. Rational businesspeople are likely to intend that any disputes arising out of their contract be decided by the same tribunal: [105].