Decisions of Interest

25 September 2023 – 8 October 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

Contracts; Estoppel; Real Property

***Horizon Hotels Pty Ltd v Australian Secured & Managed Mortgages Pty Ltd* [2023] NSWCA 231**

Decision date: 28 September 2023

Payne and Adamson JJA and Basten AJA

Mr Highmore entered into an Introducer Mandate Agreement (the Agreement) with Horizon Hotels Pty Ltd, to obtain an offer of finance for Australian Secured & Managed Mortgages Pty Ltd (ASMM). The Agreement provided that Mr Highmore's fees would only be payable if the offer provided for interest at a rate no greater than 10% above 2% per calendar month. The security available from Horizon Hotels was to be an unregistered second mortgage protected by a caveat. A letter of offer was obtained from ASMM, and Horizon Hotels accepted it, but no loan was ultimately provided. The respondents claimed that Horizon Hotels was liable to pay certain fees to Mr Highmore pursuant to the Agreement as well as expenses incurred by ASMM. Horizon Hotels had charged its property at Potts Point as security for payment of the fees. In September 2021 the respondents lodged caveats over the appellant's property and commenced proceedings seeking an extension of the caveats and payment of the amounts due under the Agreement. The primary judge extended the caveats and ordered payment of an amount of $55,600.

Held: allowing the appeal

- Mr Highmore's entitlement to fees depended on the offer adhering to the interest rate condition. The letter of offer included a standard rate which exceeded the requirement: [41]. Although the offer calculated interest at the lower "concessional rate" on the basis that the whole of the interest was prepaid on entering the loan agreement, that was not required as a term of the agreement. It was understandable that the "standard rate" was described as such to avoid it being a penalty, but the term should be given effect: [42]-[43]. The preferable reading of the offer supported the conclusion that the letter of offer did not comply with a condition of the Agreement which was essential to the crystallisation of Mr Highmore's entitlement to payment of his fees: [44].

- The proposition that the appellant signed the Agreement without including an express condition on the fee payments to Mr Highmore by reference to the security available provides no objective basis for concluding that the appellant did not think that Mr Highmore's fees were conditioned upon such a requirement: [58]. It was a common assumption of the appellant and Mr Highmore that the latter's entitlement to be paid his fees was dependent upon him obtaining an offer of finance which did not require a registered mortgage, but an unregistered one: [62]-[68]. Given the failure to obtain an offer with security limited to an unregistered second mortgage, protected by caveat, Mr Highmore was estopped from claiming his fees: [71].

Contracts; Consumer Law: misleading or deceptive conduct

***United Resource Management Pty Ltd v Par Recycling Services Pty Ltd* [2023] NSWCA 236**

Decision date: 5 October 2023

Ward P, Meagher and Gleeson JJA

Under the "Somersby agreement" URM delivered bulked-up recyclable container waste to a material recovery facility operated by Par. The contract specified the gate fees that Par could charge URM. It also provided that it terminated if an earlier contract between URM and a third party (the KES agreement) terminated. The KES agreement was replaced with the "KEE agreement" between the third party and an entity related to URM (URME). URM did not inform Par that the KES agreement had terminated. The parties continued to deal with each other as if the Somersby agreement remained on foot. After the introduction of the NSW Government's Container Deposit Scheme (CDS), URM and Par entered into the CDS Agreement, which provided that URM and Par would receive 40% and 60% of the CDS refunds respectively, and that the gate fees would increase. Par commenced proceedings claiming unpaid gate fees and repayment of the CDS refund share amounts paid to URM. URM cross-claimed, seeking damages for breach of contract and amounts due under the CDS Agreement. Par made a second cross-claim, alleging that, but for the appellants' misleading or deceptive conduct in relation to the termination of the KES and Somersby agreements, it would have charged higher gate fees and would not have entered into the CDS Agreement.

Held: allowing the appeal and cross-appeal

- The conduct of URM and Par after the KES agreement was replaced conveyed that the implied agreement was terminable on reasonable notice. To impute to the parties a common intention that the implied agreement was to terminate on the termination of an agreement of which one party was not aware (the KEE Agreement) would be to allow a unilateral amendment to the arrangement recorded in the Somersby agreement to the advantage of URM: [37]-[44].

- URM's failure to inform Par of the termination of the KES agreement and Somersby agreement, and URM's ongoing representation that the Somersby agreement was binding and remained in force, amounted to misleading or deceptive conduct: [45]-[61]. URM's comments were unqualified statements about the parties' legal rights and obligations and were not expressed in terms of an opinion or qualified as a matter only believed to be true: [51], [54]-[61].

- The primary judge erred in finding that, but for URM's misleading or deceptive conduct, Par would not have entered into the CDS Agreement. The factual narrative and objective probabilities did not support the conclusion that Par only entered into the CDS Agreement to secure higher gate fees: [62]-[89]. The primary judge also erred in the determination of the period during which URM was entitled to a 40% share of the CDS refund payments: [97]-[104].

Evidence; Equity: fiduciary duties

***J and E Vella Pty Ltd v Hobson* [2023] NSWCA 234**

Decision date: 5 October 2023

Mitchelmore, Adamson and Stern JJA

J and E Vella Pty Ltd (JEV) and its owner and director, Michael Vella (the appellants) worked with Hynadam Pty Ltd and Mechita Pty Ltd, and their respective directors Mr Hobson and Mr Soper, to provide freight services to Schweppes through Beverage Freight Services Pty Ltd (BFS). JEV, Hynadam, Mechita, Alderton Transport Pty Ltd and Evermay Pty Ltd were shareholders in BFS. Eventually, Alderton ceased to be a shareholder in BFS and Evermay ceased to be involved in BFS operations. This arrangement ended after a meeting (the Ingleburn Meeting), thus excluding JEV from providing freight services. Thereafter, entities related to Hynadam and Mechita continued to provide freight services to Schweppes with a third freight company through Beverage Distribution Australia Pty Ltd (BDA). The appellants claimed that Mr Hobson and Mr Soper acted in breach of fiduciary duties in bringing about the termination of the arrangement and causing the new arrangement to be entered into which excluded JEV. It was alleged that a number of other entities were knowingly concerned in those breaches.

Held: dismissing the appeal

- The primary judge's findings were most likely affected by impressions about the credibility and reliability of witnesses. Therefore, it must be established that the findings were "glaringly improbable" or "contrary to compelling inferences": [215]-[216].
- The primary judge's finding, that Evermay's shareholding was not the reason for the business to be migrated to BLS, was not implausible: [219]-[231], [233]-[245]. The references to BLS (rather than BFS) in documents created prior to the Ingleburn Meeting do not support a conclusion that Mr Hobson and Mr Soper were determined to move the business to BLS irrespective of whether their disputes with the Vellas were resolved: [11]-[12], [240]-[242].
- The primary judge was correct to reject Michael Vella's and Joseph Vella's account of the Ingleburn Meeting: [248]-[253], [258], [264]-[271]. Likewise, the primary judge did not err in finding that Michael Vella's evidence as to what occurred after the Ingleburn Meeting was implausible and that Mr Aikin's evidence should be accepted: [272]-[277]. The challenges to the primary judge's key factual conclusions should be rejected. In these circumstances, the appellants' grounds of appeal related to breach of fiduciary duty and of knowing assistance should also be dismissed: [262], [278]-[280].
- In dissent, Adamson JA considered that the primary judge's findings on credibility were based on the documents and objective probabilities: [119]-[121]. The parties' relationship was one of mutual trust and confidence such as to give rise to a fiduciary duty owed by Mr Hobson and Mr Soper to JEV: [137]-[145].

Administrative Law

***GR v Secretary, Department of Communities and Justice* [2023] NSWCA 239**

Decision date: 6 October 2023

Adamson JA, Basten and Griffiths AJJA

GR sought leave to appeal against the Appeal Panel of the New South Wales Civil and Administrative Tribunal's refusal of her application for leave to appeal against the Tribunal's refusal of her application to be joined as a party to guardianship proceedings concerning her son, AB; and the primary judge's orders summarily dismissing proceedings which she had brought which sought to quash the Tribunal's guardianship orders. GR had also made an application for a writ of *habeas corpus* for the unlawful detention of her son and a stay of the guardianship and financial management orders.

Held: allowing the appeal in part

- The decision of the Tribunal not to adjourn the directions hearing to a time when GR, who was a proper party, was available to participate was procedurally unfair and legally unreasonable: [97], [170], [178], [209]. GR's lack of status as a party at the substantive hearing meant that there was an egregious denial of procedural fairness, in her lack of access to the material before the Tribunal, lack of opportunity to adduce evidence and lack of right of appeal against the orders, in a way that resulted in "practical injustice". This was amplified by the circumstance that the Tribunal purported to deal with GR's application to be appointed AB's guardian at the hearing, although she was not a party, and thereby did not have a right of appeal: [101]-[103].

- GR's only avenue to challenge the guardianship and financial management orders was under s 69 of the *Supreme Court Act 1970* (NSW). Therefore, there could be no abuse of process: [120]-[121]. Despite the substantial overlap in the proceedings, different relief was claimed in the Supreme Court Proceedings, and GR was not obliged to substantiate the allegations made in support of her claim in order to resist summary dismissal if there is a triable issue. Neither matter provided a proper basis to dismiss both proceedings summarily, which involved a *House v The King* error: [121]-[125], [224]. In dissent, Basten AJA considered that there was no utility in maintaining the attempt to invoke the protective jurisdiction of the Court: [186]. Once the challenges to the orders of the Tribunal and Appeal Panel are addressed, there is insufficient prospect of a favourable outcome of the Supreme Court proceedings to warrant a grant of leave to appeal: [194], [196], [199], [200].

- There is no utility in upholding the appeal in so far as it sought a writ of habeas corpus in circumstances where an alternative remedy to s 101(3) of the *Supreme Court Act* is available to GR to challenge the guardianship decision of the Tribunal: [161], [126], [217], [219], [220].

Australian Intermediate Appellate Decisions of Interest

Planning Law

Mondib Pty Ltd v Coral Rise Pty Ltd **[2023] VSCA 237**

Decision date: 3 October 2023

Emerton P, Beach JA and Garde AJA

Mondib is seeking to develop a vacant site ("subject land"). In 2016, the relevant Council granted a permit ("the permit") for the development of the subject land for a multi-storey, mixed use building including retail and dwellings. The height of the building approved by the permit was about 50m. Subsequently, a delegate of the Council extended the permit by two years ("first extension") and, later, a further two years ("second extension"). Under the second extension, the permit expired if the development was not commenced by 21 July 2022 and completed by 21 July 2024. In 2017, a mandatory height control of 32m over the subject land ("the height control change") was introduced into the relevant planning scheme ("planning scheme"). Coral Rise applied to the Victorian Civil and Administrative Tribunal for declarations that the two extensions were invalid ("declaration proceedings"). The tribunal held that the second extension was invalid but the first was valid.

Held: allowing the appeal in part

- When determining whether mandatory factors are to be imported by implication into a provision, each head of power must be construed in its own right in accordance with the principles in *Peko-Wallsend* (1986) 162 CLR 24: [34]. Applying these principles to s 69 of the *Planning and Environment Act 1987* (Vic) ("the Act"), an authority must have regard to the current form of the planning scheme when considering an application for a permit extension under s 69: [35]-[41], [53]. The Tribunal was correct in finding that it was bound to consider the current state of the planning scheme at the time when the extension application was considered including the height control change: [49]-[52], [54].

- The exercise by the Tribunal of its discretion to make a declaration under s 149B of the Act that the second extension was invalid was justifiable: [67]-[68]. Section 149B is expressed in wide terms and confers jurisdiction on the Tribunal to make a declaration as it thinks appropriate in relation to any matter which may be the subject of an application to the Tribunal under the Act as well as anything done by a responsible authority under the Act: [65].

- It would be most unjust if a permit-holder lost the benefit of a permit because of a jurisdictional error on the part of a responsible authority in considering the extension application. Section 69(3) of the Act expressly contemplates that a decision to extend a permit may be made after the permit has expired: [75]. The *Victorian Civil and Administrative Tribunal Act 1998* (Vic) makes provision for the original decision-maker to revisit an invalid decision: [76], [78].

Patents: construction; novelty; inventive step

***Reflex Instruments Asia Pacific Pty Ltd v Globaltech Corporation Pty Ltd* [2023] FCAFC 158**

Decision date: 29 September 2023

Moshinsky, Burley and Kennett JJ

Globaltech is the patentee for the invention titled "Optical device for use with downhole equipment". At first instance, Globaltech alleged that Reflex had infringed certain claims of the Patent. Reflex cross-claimed against Globaltech alleging that the asserted claims were invalid for lack of novelty and lack of inventive step. Reflex admitted that it had infringed the Patent by supplying in Australia certain downhole survey instruments. The only issues at the hearing were whether the Patent was invalid for lack of novelty or lack of inventive step. The primary judge found that invention did not lack novelty, nor did it lack an inventive step.

Held: dismissing the appeal

- The primary judge unduly confined the field of the invention by limiting it to drilling for mineral exploration, despite the patent expressing the "field of the invention" in more general terms, referring to its application in the construction industry, and the Patent uses expressions that are used both in drilling for mineral exploration and drilling for oil and gas: [86]-[90], [96]-[100].
- The primary judge did not err in finding that the Patent does not contemplate that the Altering Means could be an optical fibre. The language used in the patent indicates that the body (with a light path) and the Altering Means are two distinct things: [114]. Likewise, the primary judge did not err in finding that a person skilled in the art would understand a "reflector" to mean only a device or part of the body having a reflective coating, nor in the construction of the expression "communicate wirelessly": [118].
- The primary judge did not err in finding that the invention possessed the requisite novelty. This is because the inventions disclosed in the prior art documents did not involve an "electromagnetic signal direction altering means" as defined in the patent, nor do the prior art documents have a light path arranged to allow the signal to pass to the electromagnetic signal direction altering means as the light path and electromagnetic signal direction altering means are the same thing in the relevant prior art document: [124], [132].
- The primary judge did not err in finding that the evidence did not establish that the problem was part of the common general knowledge: [147]. Reflex should not be permitted to advance a cased based on whether the Patent contains an admission that the problem was part of the common general knowledge because the argument on this point at first instance was based on a design task issued to a professor who was not a true reflection of the notional uninventive worker in the field: [145], [147]-[149].

Asia Pacific Decision of Interest

Banking: letters of credit

Kuvera Resources Pte Ltd v JPMorgan Chase Bank **[2023] SGCA 28**

Decision date: 28 September 2023

Court: Court of Appeal of Singapore

Menon CJ, Prakash JCA and Chong JCA

Kuvera advanced funds to a company (the "Seller") who supplied coal to a second company (the "Buyer"). The Buyer was to pay for the coal by irrevocable letters of credit ("LCs") in which Kuvera was the beneficiary. The LCs were issued by a bank in Dubai and made subject to the Uniform Customs and Practice for Documentary Credits, 2007 Revision (the "UCP600"). JPMorgan advised both LCs to Kuvera (the "Advices") and confirmed (the "Confirmations") the LCs. The Advices and Confirmations contained a Sanctions Clause. JPMorgan's internal sanctions screening procedure revealed that the vessel (the "*Omnia*") on which the coal had been shipped was included in an internal list which contained the names of various entities that had been determined by JPMorgan to have a sanctions concern. JPMorgan decided that it could not accommodate Kuvera's presentation of the documents as the transaction did not comply with the applicable sanctions laws, rules and regulations and/or its internal policies. JPMorgan informed Kuvera that JPMorgan could not obtain internal approvals to pay Kuvera. When the LCs expired, Kuvera commenced proceedings claiming that JPMorgan had acted unlawfully in not paying the money owed.

Held: allowing the appeal in part

- A documentary credit transaction comprises a number of discrete contracts with each being autonomous and independent: [27]-[29], [31]. When considering liability under one contract, it is generally unhelpful to examine whether there is any other underlying dispute relevant to another contract. In the absence of fraud, there would be no basis for enjoining the issuing bank (and the confirming bank) from paying under the letter of credit or the confirmation respectively: [30]. Only the confirming bank becomes liable in contract to the beneficiary under the confirmation. A confirming bank's liability under a confirmation may be subject to conditions that are not reflected in a letter of credit, that being an independent contract between the issuing bank and the beneficiary: [32].

- The LCs and Confirmations were unilateral contracts that are irrevocable, due to the character of a credit as defined in Art 2 of the UCP600: [35]-[36]. Because confirmations are independent and unilateral, the Sanctions Clause could simply be incorporated in the Confirmation. They did not need to be separately offered and accepted: [37].

- The Sanctions Clause did not entitle JPMorgan to decline payment on the basis of the possibility that the *Omnia* may be caught under "any applicable restriction": [41]. Whether the *Omnia* was "subject to any applicable restriction" should be determined on an objective basis without third-party input from entities, especially in circumstances in which the issue is capable of objective determination (such as ownership): [43]. JPMorgan failed to displace the inference of ownership arising from the registered owner of the *Omnia* and establish that it was Syrian-owned, thus failing to establish that *Omnia* was subject to "any applicable restrictions" under the Sanctions Clause: [62].

International Decision of Interest

Immigration; Administrative Law

Mason v Canada (Citizenship and Immigration) **[2023] SCC 21**

Decision date: 27 September 2023

Court: Supreme Court of Canada

Wagner CJ, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ

Mr Mason and Mr Dleiow are foreign nationals in Canada. Mr Mason was charged with attempted murder and discharging a firearm and Mr Dleiow was alleged to have been violent towards intimate partners. Some of the criminal charges from these incidents were dropped and he pled guilty to three others. Officials at the Canada Border Services Agency prepared reports alleging that both Mr Mason and Mr Dleiow were inadmissible to Canada under s 34(1)(e) of the *Immigration and Refugee Protection Act* (IRPA). The Immigration Division of the Immigration and Refugee Board of Canada, the Appeal Division (in Mr Mason's case) upheld that decision. The immigration bodies interpreted "acts of violence" under s 34(1)(e) broadly, without requiring there to be a link to national security or the security of Canada. The Federal Court of Appeal found that s 34(1)(e) did not require a nexus to national security or the security of Canada.

Held: allowing the appeal

- The appropriate standard of review of the administrative decisions was reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov* [2019] SCC 65): [9], [39]-[44]. No established exception to the presumption of reasonableness review applies, nor should a new exception be created on the basis that the appeals involved a serious question of general importance: [45]-[53]. Both administrative decisions were unreasonable: [10]. A person can be found inadmissible under s 34(1)(e) only if they engage in acts of violence with a nexus to national security or the security of Canada: [11].
- The Federal Court of Appeal erred in adding onto *Vavilov* an extra step of conducting a preliminary analysis of the legislation before examining the administrative decisions. A reviewing court must start its analysis with the reasons of the administrative decision maker: [79].
- Section 34(1)(e) requires a nexus to national security or the security of Canada. Section 34(1)(e) can be invoked to render a person inadmissible only when their "acts of violence that would or might endanger the lives or safety of persons in Canada" have a nexus with national security or the security of Canada. Because the Minister has not alleged that M or D engaged in acts of violence with a link to national security or the security of Canada, s. 34(1)(e) of the IRPA does not provide a legal basis for the inadmissibility of either person: [121]-[122].
- Although agreeing with the outcome, Côté J considered that the IAD's interpretation of s 34(1)(e) should be reviewed on a standard of correctness: [124].