Court of Appeal
Supreme Court
Sydney

Decisions of Interest

23 October 2023 – 5 November 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

Civil Procedure: representative proceedings

***Nguyen v Rickhuss* [2023] NSWCA 249**

Decision date: 26 October 2023

Ward P, Leeming JA and Basten AJA

Ms Rickhuss and the representative plaintiffs sued ten medical practitioners alleging that they had performed breast augmentation surgeries using a "One Size Fits All Approach", irrespective of whether different surgical techniques were indicated. It was alleged that this system carried with it a significantly higher risk of complications, and that the risk was not disclosed to patients. Section 157(1)(c) of the *Civil Procedure Act 2005* (NSW) authorises representative proceedings if, inter alia, the claims "give rise to a substantial common question of law or fact". Section 161 requires the originating process to "specify the question of law or facts common to the claims of the group members". Section 166 empowers a court to order that proceedings no longer continue as representative proceedings if it is in the interests of justice to do so. The primary judge dismissed the practitioners' application for an order discontinuing the proceedings.

Held: granting leave to appeal but dismissing the appeal

- Whether the system was used on all patients, irrespective of their personal characteristics, was a common question. So was whether the system increased the risk of harm. It was incorrect to introduce a supposed dichotomy between questions which are "common" and questions which are "individualistic" and to conclude that if a question is the latter, it cannot be a common question. The fact that the defendants might seek to lead evidence of what occurred in particular cases did not prevent there being a common question: [27]-[33].

- Whether there were common questions of law or fact did not require identifying all of the issues which would arise in the event that each group member brought separate proceedings. Although earlier forms of the rules permitting joinder of causes of action used the language of "any common question of law or fact", the present context was different, including because group members did not become parties and Part 10 of the *Civil Procedure Act* was beneficial legislation intended to enhance access to justice: [34]-[48].

- Whether the system was applied irrespective of patients' characteristics and whether it increased the risk of harm were central to the case. It was appropriate that the proceedings continue as representative proceedings: [49]-[50].

Leases: retail lease; Subordinate Legislation

Croc's Franchising Pty Ltd v Alamdo Holdings Pty Ltd **[2023] NSWCA 256**

Decision date: 27 October 2023

Payne and Stern JJA and Basten AJA

Croc's and Alamdo executed an Agreement for Lease ("AfL") and a Lease Document in registrable form which purported to create a 10-year lease over a property. The Lease was not registered so Croc's only legal proprietary interest in the premises was a tenancy at will. Croc's entered into possession, but the real occupant was its franchisee. In April 2020, the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (Cth) ("Jobkeeper Rules") was enacted. In March 2020, the National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles during COVID-19 was implemented. Sch 5 to the Conveyancing (General) Regulation 2018 (NSW) came into force in April 2020 ("the First COVID Regulation"). In October 2020, "the Second COVID Regulation" was enacted. Commercial tenants could invoke certain protections if they were eligible for Jobkeeper benefits. Under the Second COVID Regulation, the prescribed period ran from 24 October 2020 to 31 December 2020, leaving almost four months until the regulation expired on 24 April 2021. Under both regulations, cl 4 prohibited landlords from taking "prescribed action", including terminating the lease, for non-payment of rent during the prescribed period. Clause 5 prohibited termination for non-payment of rent unless there had been good faith rent negotiations. Clause 6 prohibited termination unless mediation requirements had been satisfied. In March 2020, Croc's fell behind on its rent to Alamdo. On 28 April 2020, Alamdo's director made an offer for rent relief. Croc's did not respond to the offer. Croc's paid its rent for 1 to 24 April 2020. No rent due after 24 April was paid. Alamdo purported to terminate the lease on 3 December 2020, during the "prescribed period". The primary judge found that Alamdo was entitled to terminate because Croc's was not eligible for Jobkeeper at the date of termination and therefore not an "impacted lessee" under the Second COVID Regulation.

Held: allowing the appeal

- An entity was eligible for Jobkeeper if it satisfied the "decline in turnover" test in cl 8 of the Jobkeeper Rules before the end of the fortnight in which it first applied for Jobkeeper benefits. Croc's was an "impacted lessee" under the Second COVID Regulation: [46]-[51].
- The National Code and the commercial leasing principles it contained were available extrinsic material when construing the COVID Regulations: [103], [190], [195]. The Second COVID Regulation's meaning should not be tied to that of the First COVID Regulation: [98], [196], [198]. Under the Second COVID Regulation, the cl 4 prohibition applied during the two-month prescribed period. Clauses 5 and 6 were not temporally limited to the prescribed period and could operate for the subsequent four months, albeit with narrower restrictions: [104]-[109], [197]. Clause 4's blanket prohibition prevented Alamdo from terminating the tenancy at will or the AfL agreement on 3 December 2020: [63], [110], [148]. In dissent, Basten AJA considered that cll 4, 5, 6 and 7 should be read as a package: [273], [284], [286]-[287], [289].

Administrative Law: procedural fairness

Demex Pty Ltd v McNab Building Services Pty Ltd **[2023] NSWCA 261**

Decision date: 2 November 2023

Mitchelmore, Kirk and Adamson JJA

McNab subcontracted Demex to remove large quantities of asbestos contaminated materials offsite ("export items") and import clean fill onsite ("import items"). Demex issued a payment claim under s 13 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the Act). Under the contract, payment claims for work done were to be measured in cubic metres. The evidence provided by Demex of the work done was expressed in tonnes, which had been converted into cubic metres in the payment claim. Demex did not explain how the conversion had been done either prior to or in the course of a determination by an adjudicator. The adjudicator calculated the conversion rates that Demex had applied based on the information provided, and stated that the rate was reasonable in light of industry standards. The primary judge found that the Determination was void due to a breach of procedural fairness in the adjudicator's approach to the conversion rates.

Held: allowing the appeal

- The material which an adjudicator is to consider is limited by s 22(2) of the Act. The timeframe for raising and resolving claims under the Act is tightly confined; and the decision of the adjudicator does not affect any right available under the construction contract. Adjudicators may be expected to bring their expertise to bear in making determinations: [15]-[24]. Only if there has been a substantial denial of procedural fairness by an adjudicator in determining an adjudication application will there be jurisdictional error under the Act. Generally, a conclusion of invalidity would only be reached if there was a significant departure from what would ordinarily be the requirements of procedural fairness for a person exercising a statutory power, and where that departure could be characterised as leading to substantial practical injustice in the context: [32].

- Regarding the export items, given experienced parties, and the tight timeframes, not every step in a payment claim need be spelt out: [46], [82]-[84]. McNab was able to ascertain the relevant issues as the conversion rate was readily calculable and McNab provided no submission as to why some conversion rates were or were not appropriate: [86]-[87]. It was contestable whether the adjudicator was right to attribute significance to a contractual document, which appeared to state a conversion rate. However, because the adjudicator used the document in a confirmatory way, and McNab was on notice of the use of a conversion rate, it did not represent a substantial denial of procedural fairness constituting jurisdictional error: [92]-[94]. The adjudicator went further than necessary in calculating the conversion rate applied by Demex and satisfying himself that that rate was reasonable. However, this did not cause McNab any prejudice. That conclusion could also be expressed in terms of materiality: [96]-[97]. Much the same answers applied in relation to the import items: [99], [101].

Planning Law: mixed use development

***Hinkler Ave 1 Pty Limited v Sutherland Shire Council* [2023] NSWCA 264**

Decision date: 2 November 2023

Gleeson JA, Basten AJA and Preston CJ of LEC

The commencement date of the State Environmental Planning Policy (Housing) 2021 (NSW) (2021 SEPP) was 26 November 2021. Hinkler uploaded to the NSW planning portal its development application on 22 October 2021 without an A4 plan of the building indicating, as required, its height and external configuration as erected nor the required fee. Hinkler paid the fee on 9 December 2021. The primary judge held that the requirements of cl 50(1) of the Environmental Planning and Assessment Regulation 2000 (NSW) (EPA Regulation 2000), specifically the inclusion of an A4 plan of the building and payment of the relevant fee, had not been complied with on or before 26 November 2021 such that the development application was not "made" on or before that date. Therefore, the development application was governed by the 2021 SEPP, rather than the former instrument which it replaced.

Held: granting leave to appeal but dismissing the appeal

- The transitional provision in cl 2 of Sch 7A to the 2021 SEPP fixes on the precise time at which a development application is made, being the notification of lodgement on the planning portal. In this case, notification was recorded as13 December 2021, meaning the application had not been "made" on or before 26 November 2021: [27]-[29], [33]. A development application that is not accompanied by the required information, documents and fees required by the EPA Regulation 2000, is ineffective to engage the power of the consent authority to grant consent to the development application. The development application had not been "made" for the purpose of the savings provision: [113], [114].

- The Council must have a complete development application before costs can be estimated and a fee for service calculated and notified to the applicant: [34], [40]. A development application is taken not to be lodged until the accompanying fee is paid. Accordingly, the application is not made until the fee is paid: [37], [43], [129], [160]. Notification of the fee by the Council on 2 December 2021 did not contravene the requirement that the fee be notified within 14 days of lodgement, as the Council's final request for required documents and information had not been satisfied until 1 December 2021: [44], [46], [164].

- The primary judge's function, in hearing an appeal from the refusal (or deemed refusal) of a development application, was to make the decision which should have been made by the consent authority: [67], [147].

- The primary judge did not misdirect himself in having regard to a cross-reference within cl 2(1)(d) of Sch 1 to cl 56(2)(b) of the EPA Regulation 2000 which required the prescribed information "in a concise visual form". The judge correctly focused on those public purposes in considering the need for compliance with the requirements of the EPA Regulation 2000: [68], [150]-[152].

Australian Intermediate Appellate Decisions of Interest

Consumer Law: misleading or deceptive conduct; reliance

***Mikkelsen v Li* [2023] VSCA 255**

Decision date: 29 October 2023

Ferguson CJ, Beach and McLeish JJA

In 2016, the respondents, Zhiren Li and Baotong Liu, agreed to purchase shares in Forever Exotic Pty Ltd. Ms Mikkelsen founded Forever Exotic and operated the business with her husband Mr Mikkelsen ("the applicants"). The applicants were the directors of Forever Exotic Pty Ltd, which was incorporated on 29 August 2016 to facilitate the sale to the respondents. After the sale, a dispute arose as to representations made by the applicants before the sale about the profitability of the business. The primary judge found that the applicants had made misrepresentations that amounted to misleading or deceptive conduct under the *Australian Consumer Law* and also amounted to negligent misstatement. Her Honour found that the respondents would not have entered into the sale were it not for the misrepresentations.

Held: refusing leave to appeal and allowing the cross-appeal

- Section 137B of the Commonwealth *Competition and Consumer Act 2010* (Cth) ("ACL Act") did not apply to this claim: [77]-[78], [81]. The respondents' case could have been advanced under either the State ACL Act, the ASIC Act or the Corporations Act, but could only be understood as relying on the State ACL Act: [83]. The respondents must succeed in their challenge to the application s 236 of the Commonwealth ACL Act to reduce damages for contributory negligence. No such defence was available to the applicants under the Australian Consumer Law as it applied in this case: [84].
- The objective nature of the representations and the evidence indicated that the representations induced the respondents to enter into the agreement: [96]-[97], [99]-[100]. Neither Mr Liu's daughter's role as an intermediary, nor the respondents' failure to seek legal or valuation advice broke the causal nexus between the representations and the respondents' decision to enter into the contract: [98], [101]-[102].
- The trial judge did not err in finding that the respondents failed to undertake adequate due diligence, and that the respondents did not seek professional external advice. The decision not to waive privilege on any legal advice prevents the respondents from asserting that they were provided with such advice: [138]-[140]. However, the judge erred in assessing whether the respondents' loss or damage was "[the] result partly" of the failure to take reasonable care, by failing to address the question of whether the failure to take reasonable care was a factor in the subsequent loss or damage suffered: [141], [143]. The nature and circumstances of the representations were such that there should be no reduction on account of contributory negligence: [142], [144].

Industrial Law: enterprise agreements

***Murtagh v Corporation of the Roman Catholic Diocese of Toowoomba* [2023] FCAFC 172**

Decision date: 30 October 2023

Collier, Logan and Meagher JJ

Until he resigned on 6 December 2019, Mr Murtagh was employed by the Diocese. Until he resigned on 31 December 2019, Mr O'Mara was employed by Downlands College, Toowoomba. Until their resignations, including on 1 July 2019, Mr Murtagh fell within a class of employees as defined under *The Catholic Employing Authorities Single Enterprise Collective Agreement - Diocesan Schools of Queensland 2019-2023* (2019-2023 Diocesan Schools Agreement) and Mr O'Mara fell within a class of employees as defined under *The Catholic Employing Authorities Single Enterprise Collective Agreement – Religious Institutes Schools of Queensland 2019-2023* (2019-2023 Religious Institutes Schools Agreement). Both enterprise agreements came into operation on 2 December 2020; the nominal expiry dates of the predecessor agreements was 30 June 2019. The new agreements provided school teachers and other employees with staged salary increases, effective on 1 July 2019. The salary increases were not paid and Mr Murtagh and O'Mara commenced proceedings on the basis that the employers had contravened s 50 of the *Fair Work Act 2009* (Cth) ("FWA"). The primary judge dismissed the application on the basis that the enterprise agreements did not apply to employees who resigned before the agreements came into operation.

Held: allowing the appeal

- The future tense used in various "permitted matters" in s 172(2) of the FWA reflect the inevitability of a lag, between when an enterprise agreement is made and any approval given by the industrial commission. This is not inconsistent with the provision of back pay once an agreement comes into operation in the future after approval. One factor which may be influential in engendering a majority of employees "covered" to vote for a proposed agreement is the knowledge that, once operative after a lag, back pay will flow to them: [34]-[35].

- The effect of s 58(2)(e) of the FWA is that as soon as the 2019-2023 Diocesan Schools Agreement and the Religious Institutes Schools Agreement came into operation on 2 December 2020, the agreements they replaced forever ceased to operate. Instead, the whole of the new agreements came into force, including a clause in each which backdated pay increases to those who were "applicable employees" on 1 July 2019: [43]-[45], [47]. Both workers were employed on that date and therefore "applicable employees": [49].

- The agreements do not distinguish between teachers who were employed as at 1 July 2019 but who ceased employment before each agreement came into operation on 2 December 2020 and those who remain employed when the agreements came into operation: [48]. This construction is consistent with s 58(2) of the FWA. On and from 2 December 2020, the employers were obliged to pay back pay to "applicable employees" at the first pay period after that date: [49].

Asia Pacific Decision of Interest

Constitutional Law; Schooling; Anti-Discrimination

Vatuvonu Seventh Day Adventist College v Attorney General **[2023] FJSC 42**

Decision date: 27 October 2023

Court: Supreme Court of Fiji

Temo CJ, Arnold and Young JJ

The College is a denominational school which was established and registered in 2012 under the *Education Act 1966* (Fiji) as a high school by the Seventh Day Adventist Church in Fiji ("the Church"). Like other denominational schools, the College receives extensive government aid. Two disputes arose between the Church and the Ministry of Education, Heritage and Arts. First, although the Ministry accepted that where a denominational school does not receive state aid, it is entitled to appoint its Head of School and teaching staff itself, the Ministry considered that where such a school does receive government funding, the Permanent Secretary must select Heads of School and teachers in a non-discriminatory manner, including on the basis of religious belief. The second dispute was whether a religious community or denomination requires the approval of the Permanent Secretary to close an aided school or to convert it into a private school.

Held: allowing the appeal

- The rights conferred by the Bill of Rights may be limited by: express statutory limitations, the Constitution or limitations inferred as being necessary in terms of the law or actions carried out under the law: [37]. When considering the application of the Bill of Rights to any law, it must be interpreted in context: [38].
- Where a person is treated differently on the basis of their religious belief by a religious organisation claiming to exercise its rights under s 22(4) of the Constitution, it is appropriate to talk of a conflict of rights. The mediating principle in that context is "fairness", being whether the religious organisation can establish that the discrimination on religious grounds is "not unfair in the circumstances". It is not self-evident that a religious organisation can always establish this simply by asserting that it was exercising its rights under s 22(4): [51].
- Given the extensive powers the state exercises over schools ([26]-[30]), the rights of students to opt out of religious education ([43]-[44]), and the anti-discrimination, secular state and right to education provisions in the Bill of Rights ([48], [52], [61]), it follows the right to freedom of religion is not absolute and may properly be subject to limitations: [58]. A religious organisation that accepts aid for a school may not refuse to enrol a child on religious grounds; and must accept government teachers selected in accordance with the required procedures: [68]-[69]. However, the Permanent Secretary may take religious communities' wishes into account regarding critical appointments, such as Heads of School, at aided denominational schools: [77].
- The Church was not free to close the College, or to change it to a private school, whenever it wished. By function of the Permanent Secretary's regulatory role, she was entitled to require the College to remain open for a longer period than the Church wished so as to give students and teachers the time to make alternative arrangements: [84].

International Decision of Interest

Torts: duty to inform; good faith

Ponce v. Société d'investissements Rhéaume ltée **[2023] SCC 25**

Decision date: 27 October 2023

Court: Supreme Court of Canada

Wagner, Karakatsanis, Brown, Rowe, Kasirer, Jamal and O'Bonswain JJ

Mr Ponce and Mr Riopel were presidents of three Quebec companies ("Groupe Excellence") of which Mr Rhéaume and Mr Beaulne were majority shareholders. The presidents and shareholders entered into a "President's Agreement". While the Agreement was still in force, the presidents learned that a third party was interested in acquiring the companies. Rather than informing the shareholders, the presidents purchased the whole of the shareholders' stakes and then resold them for a profit. The primary judge found that the presidents had used their roles to obtain information for their own benefit and had breached the duties of honesty and loyalty they owed to Groupe Excellence and the shareholders (by function of an incentive pay Agreement entered between the presidents and the shareholders). The judge ordered the presidents to pay the shareholders an amount equal to the profits earned on the resale of the group to the third party. The primary judge, however, concluded that the obligations breached by the presidents were merely contractual obligations arising from the Agreement.

Held: dismissing the appeal

- The presidents' failure to inform the shareholders of the third party's interest in acquiring the group was a breach of the requirements of good faith: [11], [85]. The presidents breached contractual loyalty linked to good faith, which was an implied obligation under the contract through the combined effect of articles 1434 and 1375 of the Civil Code of Québec ("Code"): [70]-[71]. While the presidents did not have to subordinate their interests to those of the shareholders, the requirements of good faith in the performance of the Agreement included a duty for the presidents to inform the shareholders of the third party's interest: [77].

- The Agreement also involved an implied obligation to provide the shareholders with all information relevant to making an informed decision about the sale of their shares. This implied obligation flowed from the nature of the Agreement, which reflected the presumed intention of the parties, in accordance with article 1474 of the Code. In short, the Agreement was intended to formalise a mutually beneficial business relationship between the presidents and the shareholders: [54]-[58], [61].

- Since the presidents did not show any palpable error in the trial judge's conclusion that the shareholders' lost gain was equivalent to the profits made by the presidents, the assessment of the damages to be paid to the shareholders was upheld: [116]-[118].