Court of Appeal
Supreme Court
Sydney

Decisions of Interest

23 February 2024 – 8 March 2024

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

Environment and Planning: Delegation of functions

Filetron Pty Ltd v Innovate Partners Pty Ltd atf Banton Family Trust 2 and Goulburn Mulwaree Council **[2024] NSWCA 41**

Decision date: 29 February 2024

Ward P, Gleeson and White JJA

Filetron Pty Limited (Filetron) commenced proceedings in the Land and Environment Court contesting the validity of a consent (Consent) issued by a delegate of Goulburn Mulwaree Council (Council) in regard to a development application (DA) submitted by Innovate Partners Pty Limited (Innovate). Filetron owned land neighbouring the land subject to the DA, and provided submissions contesting the DA (albeit, outside the public exhibition period).

Filetron argued that the delegate failed to properly consider certain items as required under s 4.15(b) of the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act), and that the delegate's authority to determine the application was restrained by a provision of the instrument of sub-delegation (Instrument), namely that a delegate could not determine a DA in respect of which there was an unresolved submission.

The primary judge held that, although the delegate did have authority to determine the DA, he failed to consider matters prescribed by the EP&A Act. Accordingly, the Consent was suspended, and orders were imposed under s 25B of the *Land and Environment Court Act 1979* (NSW). The primary judge found that the Council complied with these orders, and the consent was validly regranted.

The Court held (per White JA, Gleeson JA agreeing, Ward P dissenting) allowing the appeal:

- Filetron's submission was a "submission by way of objection" within the meaning of the Instrument even in circumstances where it was provided outside the public exhibition period: [110] – [111], [122], (Ward P) [228] (White JA, Gleeson JA agreeing).
- There was no antecedent resolution of Filetron's objection, such that the delegate's authority to determine the DA was restricted. The Submission could not be unilaterally determined by the delegate, but rather required the delegate to convince Filetron to withdraw it, to convince Innovate to withdraw the DA, or bring the parties to an agreement: [237] – [246] (White JA, Gleeson JA agreeing).
- In dissent, Ward P observed that whilst the delegate could not subjectively write himself into power, the power of resolution is not the sole province of the objector; whether the submission was resolved must be able to be determined objectively. Here, the delegate had considered, and resolved, the submission: [157] – [162].

Torts: Battery and false imprisonment

***State of New South Wales v Madden* [2024] NSWCA 40**

Decision date: 22 February 2024

Bell CJ, Leeming and Stern JJA

On 30 December 2019, Ms Madden was walking with Mr Turner in South Penrith. The pair were stopped and searched by two police officers. A knife, together with some men's clothing, was found in a black bag carried by Mr Turner. Ms Madden denied any knowledge of the knife, but gave an unclear explanation regarding the origin of the clothing. Ms Madden was arrested and charged with three offences: custody of a knife in a public place pursuant to s 11C of the *Summary Offences Act 1988* (NSW); having custody of clothing reasonable suspected of being stolen contrary to s 527C of the *Crimes Act 1900* (NSW) (Crimes Act); and resisting an officer contrary to s 58 of the Crimes Act.

The primary judge found that Ms Madden's detention was contrary to s 21 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA), such that all physical contact with Ms Madden amounted to battery, and that Ms Madden's arrest was unlawful pursuant to s 99 of the LEPRA, such Ms Madden was falsely imprisoned. The primary judge also found that Ms Madden was maliciously prosecuted for possession of the knife. Section 43A of the *Civil Liability Act 2002* (NSW) was held not engaged, such that the State was vicariously liable for the conduct of the officers. Ms Madden was award $320,000 plus interest and costs.

The Court held (Bell CJ, Stern JA agreeing, Leeming JA dissenting as to the lawfulness of the detention but otherwise agreeing), dismissing the State's appeal:

- The primary judge's assessment as to the unlawfulness of the detention was premised on his rejection of police evidence, and the State could not overcome, on appeal, the high hurdle that challenges to credit-based findings require: [122] (Bell CJ), [241] (Stern JA).
- The officer reasonably suspected that Ms Madden was in possession of something used or intended to be used in the commission of an offence, or an illicit substance and thereby engaged s 21(1)(b) or (d) of LEPRA. This belief was referable to the fact the officer was familiar with the criminal history and behaviour of Ms Madden: [216] – [221] (Leeming JA).
- Mr Turner, not Ms Madden, was in possession of the bag containing the clothes and the knife at all material times. The meaning of "custody", being in the possession of a person at the time of apprehension, is consistent between s 527C of the Crimes Act and s 11C of the *Summary Offences Act 1988* (NSW): [126] – [127], [167], [177] (Bell CJ), [239] (Stern JA), [234], [239] (Leeming JA).
- The s 58 charge cannot be divorced from the other two charges, such that without probable cause in relation to the other two charges, the officer could not have had probable cause in relation to the s 58 charge: [173] (Bell CJ), [237] (Leeming JA), [239] (Stern JA).

Australian Intermediate Appellate Decisions of Interest

Tort: Causation

***Davie v Manuel* [2024] WASCA 21**

Decision date: 7 March 2024

Buss P, Vaughan JA, Seaward J

In May 2015, Ms Davie travelled to a backpacker hostel owned by Ms Manuel, with a view to undertaking work in rural Australia for three months in order to extend her working visa. Backpackers would borrow cars owned by Ms Manuel to drive to work.

At 6:45 am on 26 June 2015, Ms Davie, together with two others, set out in one of Ms Manuel's cars to a farm owned by Mr Saunders, approximately 100km from the hostel. On an unsealed road, approximately 2 or 3km from the farm, the car slid and rolled onto its roof, facing the opposite direction. Ms Davie was trapped in the car, and suffered a number of serious spinal injuries that resulted in incomplete tetraplegia.

The primary judge found that Ms Manuel breached her duty to maintain the car provided to Ms Davie by failing to ensure there was a working speedometer, but found that Ms Davie's evidence that she would have driven at a different speed had she had available precise knowledge of her speed was 'contrived'. The primary judge held that she was not satisfied that the lack of a working speedometer caused or materially contributed to the accident. Broadly, Ms Davie's grounds of appeal concerned a failure to comply with the rule in *Browne v Dunn*, and the conclusion of the primary judge that Ms Davie would not have driven differently had the car had a working speedometer.

The Court held (Buss P, Vaughan JA and Seaward J agreeing), dismissing the appeal:

- The use of 'contrived' by the primary judge was intended to denote artificiality in Ms Davie's implicit suggestion that a driver makes decisions about speed based on a reading given by the speedometer, and not untruthfulness or dishonesty. It follows that the lack of cross-examination of Ms Davie on this point did not reveal any failure to comply with the rule in *Browne v Dunn* or a failure to accord procedural fairness: [81] – [82], [109] – [118].
- There was nothing unreasonable, illogical, or irrational in the reasoning process used by the primary judge to arrive at the conclusion that the lack of a working speedometer caused or materially contributed to the accident. The evidence advanced to establish this ground (what Ms Davie would have done absent Ms Manuel's negligence) is inadmissible for the purposes of establishing causation: [130] – [134].
- It was not sufficient, for the purposes of factual causation, to merely establish the cause of the accident. It must be determined what Davie would have done if the tortfeasor were not at fault. This is a question of inference to be determined on limited evidence: [139].

Interpretation: Preservation of rights on amendment of statute

***Gouger Street Pty Ltd v Diakou Nominees Pty Ltd* [2024] SASCA 17**

Decision date: 29 February 2024

Livesey P, Doyle and Blue JJA

At the time of the commencement of a lease (Lease) between the appellant (Gouger) and the respondent (Daikou) over the Talbot Hotel in Adelaide (Hotel), the *Retail and Commercial Leases Act 1995* (SA) (Act) was inapplicable because the rent payable under the Lease exceeded the prescribed threshold. However, following an increase in the threshold, from 4 April 2011, the Act applied to the Lease and any renewal thereof. Consequently, the rent review provisions of the Lease became subject to s 22 of the Act.

Briefly, s 22(3) renders void any rent review provision to the extent it provides a party with a discretion to elect between two or more methods in calculating a change in rent, and renders void a rent provision that provides for a change in rent to be in accordance with whichever of the two methods provides for a higher result, and s 22(4) renders void any provision that prevents a rent review from resulting in a decrease in rent.

Clauses 4.10(a) and (b) provided a mechanism for rent review and reserved a discretion to elect between the higher of the two calculations, and cl 4.10(c) provided that under no circumstances shall the rent payable following review be a decease in that which was previously payable.

The Court held (Livesey P, Doyle and Blue JJA), allowing the appeal in part:

- Section 22(4) is not concerned with clauses which involve a mechanism for determining the adjusted rent which itself builds in a choice between two methods of calculating the adjustment. It is strictly targeted at circumstances where a mechanism, once applied, results in a decrease, but a collateral provision disapplies the effect of that mechanism. Clauses 4.10(a) and (b) are only concerned with a discretion between mechanisms. Section 22(4) therefore does not apply to, and does not invalidate, those clauses. However, cl 4.10(c), insofar as it purports to prevent the rent from decreasing on review, is invalidated by s 22(4): [79] – [81].
- Section 22(3)(c), on the other hand, operates to invalidate cll 4.10(a) and (b) "to the extent" they provide for a mechanism which automatically selects the higher of the two methods. It does not merely disallow one or the other limb of such mechanism, but rather the provision in its entirety: [86].
- The invalidation of s 4.10(a), (b), and (c) does not invalidate the Lease. Under cl 2.1 of the Lease, the parties agreed that the Gouger would pay "the annual rent hereby reserved …, subject always to review….". Although the invalidation of cl 4.10 negates the review mechanisms, it cannot be said that the parties failed to reach an agreement as to rent payable: [105] – [107].

Asia Pacific Decision of Interest

Defamation: Restraint of publication

John Atcherley Dew v Discovery NZ Limited **[2023] NZCA 589**

Decision date: 8 March 2024

Cooper P, French and Goddard JJ

This appeal concerned an attempt to prevent the broadcast on television of a programme alleging serious sexual abuse by Cardinal John Dew and others, all of whom were priests or sisters in the Roman Catholic Church. Interviews with two victims, Mr Carvell and Ms Carvell, which was conducted by Mr Morrah, were intended to be aired on TV3 by Discovery NZ Limited (Discovery).

Cardinal Dew commenced proceedings in the High Court alleging defamation and invasion of privacy in respect of an ongoing police investigation and sought an interim injunction restraining publication. The interim injunction was denied, but an injunction was granted temporarily pending the determination of the appeal.

The Court of Appeal considered three justifications for the publications of restraint: on the bases of defamation, interference with the administration of justice, and invasion of privacy.

The Court held (Cooper P, French and Goddard JJ), dismissing the appeal:

- The threshold for prior restraint of defamatory material is a jurisdiction to be "very carefully exercised". The court will not grant an injunction restraining publication if the defendant states his intention of pleading a recognised defence, unless the plaintiff can satisfy the court that the defence will fail. While the defendant need not establish a defence of truth will succeed, there must be a reasonable possibility that it will. Here, the Court could not rule out that there was a reasonable possibility that Discovery's defence of truth or responsible communication on a matter of public interest would succeed: [84] – [118].
- The Court was not persuaded that the right to apply for name suppression in the event of a prosecution being commenced would be a proper basis on which to restrain the broadcast, nor that it would be appropriate to order prior restraint on the basis that the programme would have a real likelihood of prejudicing fair trial rights. The Court distinguished *R v Burns (Travis)*, but did not depart from the principle that where there is a significant risk that a defendant will not receive a fair trial, open justice should not prevail over the right to a fair trial: [119] – [123], [126].
- Per *Hosking v Runting*, to establish a right to privacy in tort, Cardinal Dew was required to prove "the existence of facts in respect of which there is a reasonable expectation of privacy". This task was impossible because the Cardinal's response to the allegations was that he was not responsible for the conduct alleged: [127] – [130].

International Decision of Interest

Contract: Lotteries

Joan Parker-Grennan v Camelot UK Lotteries Limited **[2024] EWCA Civ 185**

Decision date: 26 February 2024

Lord Justice Green, Lady Justice Andrews, Lord Justice William Davies

In August 2015, Camelot introduced the Interactive Instant Win Game (IWG) entitled "£20 Million Cash Spectacular" (Game). Ms Parker-Grennan created a National Lottery Account, agreed to the terms and conditions of use (T&Cs) via a click-wrap procedure, and purchased a ticket in order to play. The Game offered players a 1 in 2.86 overall chance of winning a case prize each play. The aim of the Game was to match any number in "YOUR NUMBERS" section with a number in the "WINNING NUMBERS" section.

With a stake of £5, Ms Parker-Grennan hit play, and won £10 after her numbers corresponded with prize tier 27. However, she noticed that there also appeared to be matching number 1s – the number which won the top prize of £1,000,000. It transpired that this was a coding error, and the winnings were therefore excluded by a provision of the T&Cs.

Three issues arose on appeal. First, whether Camelot's terms were incorporated in the contract between Camelot and Ms Parker-Grennan. Second, if incorporated, were they enforceable. Third, as a matter of construction, did she win £10, or £1,000,000.

The Court held (Lord Justice Green, Lady Justice Andrews, Lord Justice William Davies), dismissing the appeal:

- On the first issue, the legal test to be applied is whether Camelot did what was reasonably sufficient to bring the various T&Cs to the notice of a player of the Game. It was not necessary to signpost the T&Cs as they were not "onerous or unusual" in the sense described in *O'Brien v MGN Ltd* [2001] EWCA Civ 1279. In these circumstances, enough was done to incorporate the T&Cs into the contract between Camelot and Mrs Parker-Grennan: [31] – [33], [50] – [51].
- On the second issue, the relevant provision would be unenforceable where it causes "a significant imbalance (within the meaning of *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52) in the parties' rights and obligations arising under the contract, to the detriment of the consumer". Here, the network of contractual provisions was clearly drafted, readily accessible, and their operation could not be regarded as creating a significant imbalance in the contracting parties' rights: [53] – [56].
- On the third issue, it would have been clear to Ms Parker-Grennan, had she read the Game procedures, it was not enough for a number in the lower section to correspond with a number in the upper section; they would have to turn white and flash, and the amount won must be displayed. When the game concluded, it was clear she had only won £10: [65] – [67].