Court of Appeal
Supreme Court
Sydney

Decisions of Interest

8 March 2024 – 22 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.

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New South Wales Court of Appeal Decisions of Interest

Guarantee and indemnity: Unconscionable conduct

Dalton and Schaeffer as Executors of the Estate of the Late John Herman Schaeffer v Naegeli **[2024] NSWCA 51**

Decision date: 13 March 2024

Ward P, Stern JA, Griffiths AJA

In late 2019, Mr Naegeli, for and on behalf the Human Enhancement Project (HEP), entered into a Cash Funding Agreement (CFA) with CRB Investment Holdings Pty Limited (CRB), represented by Mr Schaeffer and Mr Blinkworth. Under the CFA, in exchange for HEP loaning $500,000 to CRB, CRB agreed to pay $6.5 million in thirteen instalments to HEP in "revenue" payments.

Mr Naegeli procured a personal guarantee from Mr Schaeffer, and a guarantee from two of Mr Schaeffer's private companies (together, Guarantee). The Guarantee provided that the guarantors were immediately liable for any outstanding payments (then totalling $3.5 million), and any further payments thereafter at a rate of 10% on any unpaid amounts.

Both Mr Schaeffer and Mr Blinkworth died in 2020. CRB made no payments under the CFA, and was wound up on 14 October 2020. Mr Naegeli brought proceedings against Mr Schaeffer's executors, seeking judgment in the sum of $6.5 million plus interest. The defendants contended that, in procuring the Guarantee, Mr Naegeli engaged in unconscionable conduct and/or the contract was unjust under the *Contracts Review Act*. The primary judge dismissed the unconscionability claim, but upheld the *Contracts Review Act* claim in part, limiting the award to $500,000 plus interest at the rate prescribed in the Guarantee. Both parties appealed.

The Court held (Ward P, Stern JA and Griffiths AJA agreeing), dismissing the appeal, and allowing one ground of the cross-appeal:

- Mr Schaeffer understood the effect of, and entered freely, the Guarantee. Mr Schaeffer also understood the nature of the CFA (at least in general terms). These conclusions militated against a finding of unconscionable conduct: [142].
- No inference could be drawn that Mr Schaeffer was under a special disadvantage, or that Mr Naegeli was aware of, or took advantage of, any such disadvantage. The improvidence of the terms of the Guarantee, or the financial position of CRB, could not support this finding: [134] – [139], [154] – [178].
- While the terms of the Guarantee were both onerous and significant, Mr Schaeffer was a sophisticated commercial operator, could have negotiated the Guarantee if he so desired, and appeared to decide that the execution of the Guarantee was in his own personal or financial interest, given he was concerned with the success of CRB: [211] – [217].

Statutory interpretation: Workers' compensation

***Secretary, Department of Communities and Justice v Stewart* [2024] NSWCA 59**

Decision date: 20 March 2024

Leeming and Stern JJA, Griffiths AJA

While employed by the Secretary, Departments of Communities and Justice (Secretary), Mr Stewart suffered an injury (Earlier Injury). Mr Stewart received weekly compensation payments under the *Workers Compensation Act 1987* (NSW) (Compensation Act) for the period 20 November 2020 to 1 February 2021. On 1 February 2021, Mr Stewart lodged a claim for further injury occasioned by his employment (Later Injury).

On 25 February 2021, Mr Stewart was notified that his pre-injury average weekly earnings for the Later Injury was $1565.58 (based upon gross earnings of $81,415.30 averaged over 52 weeks). This figure did not include compensation payments made in respect of the Earlier Injury. However, the compensation payments were taken into account in the averaging calculation.

The central issue that arose on appeal was whether Mr Stewart, while receiving compensation payments for the Earlier Injury, was on "unpaid leave" within the meaning of r. 8E of the Workers Compensation Regulation 2016 (NSW) (2016 Regulation).

The Court held (Griffiths AJA, Leeming JA agreeing with separate reasons, Stern JA in dissent), allowing the appeal:

- The *Compensation Act* uses the term "leave" in the sense of an entitlement or authorisation which relieves a worker of their duties as conferred by or under an employment contract, statute, or industrial agreement. The receipt of workers compensation while absent from work is therefore not "unpaid leave" within the meaning of either cl 2(3)(a) of Sch 2 of the *Compensation Act* or reg 8E of the 2016 regulation. The assigning of a strained meaning would sit uncomfortably with the legislative scheme: [131] – [135], [139] - [141] (Griffiths AJA)
- The regulation-making power authorised the making of regulations to provide for the adjustment of the earning period to take into account any period of unpaid leave or change in circumstances. The regulation fell short of a full exercise of power. Here, there was no justification to adopt an expansive construction of the phrase. Further, the regulations did not deal with this particular set of circumstances, nor did they have the appearance of a comprehensive scheme: [13] – [15] (Leeming JA)
- It is unlikely Parliament intended Sch 3 of the *Compensation Act* to have the consequence that Mr Stewart would necessarily receive lower compensation on account of his Earlier Injury. The phrase "unpaid leave" is sufficiently broad to comprehend a period during which a worker is absent by reason or incapacity: [98], [106] – [112] (Stern JA in dissent)

Environment and planning: Permissible use

***Cooke v Tweed Shire Council* [2024] NSWCA 50**

Decision date: 11 March 2024

Ward P, Gleeson JA and Basten AJA

Dolph Cooke and his associates operated a business selling hemp-infused products (such as olive oil and beeswax). This involved two related processes: (i) growing hemp and (ii) harvesting, processing, infusing, and packaging the products. These activities occurred on two parcels of land within the Tweed local government area. Although Mr Cooke held a licence to cultivate low-THC hemp, the processing, infusing, and packaging activities without consent was unlawful development under the terms of the Tweed Local Environment Plan (Tweed LEP).

In the Land and Environment Court, the primary judge concluded that the ultimate purpose of the land was to sell the hemp-infused products, which constituted "rural industry", for which development consent had not been obtained.

Three issues arose for determination in the Court of Appeal. First, the appropriate standard of appellate review to be applied in determining the categorisation of the land. Second, the identification of permissible uses without consent. Third, the proper characterisation of Mr Cooke's land.

The Court held (Ward P, Gleeson JA and Basten AJA), granting leave to appeal but dismissing the appeal:

- Consistent with the High Court's decision in *GLJ* [2023] HCA 32, the correctness standard should be applied reviews of findings as to categorisation of land use: [34] – [36].
- The Tweed LEP permitted two uses of land without consent. The first was "horticulture", whose definitory sub-category included "cut flowers and foliage". While hemp was a flowering plant, cultivating hemp did not constitute "horticulture". The second was "extensive agriculture". Although growing hemp was the "production of [a crop]… for commercial purposes" (within the meaning of "extensive agriculture"), that terminology did not extend to the processing of the hemp product, which was separately covered by the category of "rural industry", which required consent. Further, none of Mr Cooke's uses could properly be considered "ancillary" to the two permissible uses, particularly where processing is separately categorised: [41], [49] – [52].
- The activities carried out on the land could not be characterised as two separate activities. Rather, the growing of hemp and its subsequent processing were part of a single integrated purpose – the selling of hemp infused products. By virtue of this finding, it is immaterial that one of Mr Cooke's uses of land was permissible without consent: [54] – [63].

Building and construction: Damages

***McDonald v MAK Constructions and Building Services Pty Ltd* [2024] NSWCA 63**

Decision date: 21 March 2024

Payne and Adamson JJA, Griffiths AJA

In 2022, McDonald (Owner) contracted with MAK Constructions (Builder) for residential building work (Contract). After significant progress had been made, the Contract was terminated by the Owner. The Builder subsequently made a payment claim under the *Security of Payment Act 1999* (NSW) (SOP Act). The Owner then commenced proceedings against the Builder seeking rectification and completion costs.

The Builder obtained an adjudication certificate under s 22 of the SOP Act in the amount of $245,493.20. The adjudication certificate was filed in the District Court as a judgment for debt in that amount pursuant to s 25 of the SOP Act, and the Builder sought a stay of the other proceedings pending payment of the judgment for debt by the Owner. This stay was granted on 21 July 2023.

The Court held (Griffiths AJA, Payne and Adamson JJA agreeing), allowing the appeal and setting aside the stay with costs:

- There is nothing in the legislative scheme that supports the primary judge's finding that, whilst the Owner's right to bring a claim at common law is preserved by s 32(3) of the SOP Act, that right is subject to the judgment for debt in favour of the Builder first being satisfied. The terms of s 32 state unequivocally that nothing in Pt 3 of the SOP Act, which sets out the procedure for recovering progress payments, affects any rights of a party to a construction contract and that nothing done under or for the purposes of Pt 3 affects any civil proceedings arising under a construction contract: [49] – [57].
- The primary judge's exercise of discretion to stay the proceedings miscarried as a result of her misconstruction and misapplication of s 32 of the SOP Act, and for four other reasons. First, the primary judge failed to properly consider and assess the Owner's case. Second, the Owner's amended statement of claim was mischaracterised was a cross-claim. Third, by virtue of being mischaracterised as a cross-claim, the primary judge erred in holding said claim prohibited by s 15(4)(b)(i) of the SOP Act in circumstances where s 15 had no application. Fourth, the Builder failed to take prompt and meaningful steps to enforce the judgment debt: [59] – [64].
- A stay of the Owner's proceedings is not justified. First, a stay would be inconsistent with the rights preserved by s 32 of the SOP Act. Second, the Builder's failure to take prompt steps to enforce the judgment debt weighs heavily against a stay being granted. Third, the financial hardship of the respective parties is a neutral factor, as each party would suffer some degree of hardship if unsuccessful. Fourth, there is no basis to consider the Owner's claim hopeless or lacking in reasonable prosects: [68] – [72].

Australian Intermediate Appellate Decisions of Interest

Jurisdiction

Deng v Australian Capital Territory **[2024] ACTCA 10**

Decision date: 15 March 2024

McCallum CJ, Mossop and McWilliam JJ

Deng was arrested in 2019 and charged with breaching a Special Interim Family Violence Order (SIFVO). The SIFVO was to continue "until all related charges [were] finalised", which occurred on 30 August 2019. On 22 October 2019, Deng breached the purportedly-expired SIFVO, and was arrested by the AFP. After 58 days on remand, Deng was released from custody, and the charge was dismissed because, as a result of the wording of the SIFVO, there was no prohibition in the SIFVO that could be breached.

Deng instituted proceedings in the ACT Supreme Court against the ACT, the Magistrates Court, and two magistrates, alleging lack of jurisdiction, false imprisonment, and negligence. These proceedings were dismissed, and Deng subsequently appealed to the ACT Court of Appeal.

The Court held (McCallum CJ, Mossop and McWilliam JJ), dismissing the appeal with costs:

- The primary judge was correct to find that just because certain restrictions of an SIFVO might end, the SIFVO itself could only be ended by operation of the *Family Violence Act 2016* (ACT). As occurred in *Brown v Australian Capital Territory* [2020] ACTSC 70, the mere fact that the prosecution may not have been able to establish one of the elements of the offence required by s 43(1) of the *Family Violence Act 2016* (ACT), namely, engaging in conduct in contravention of a family violence order, did not have the effect of denying the court jurisdiction to determine that issue. Once it had jurisdiction to determine that issue, it was entitled to exercise the powers under ss 70 and 74 of the *Magistrates Court Act 1930* (ACT) to remand Deng in custody: [37] – [48].
- Absence of evidence on a critical element of a charge denies the court jurisdiction to make orders based upon finding the charged proved, but does not deny a court jurisdiction to hear a matter: [50]
- The remand of Deng was not arbitrary within the meaning of the *Human Rights Act 2004* (ACT), insofar as it was not "capricious, unreasoned or without reasonable cause". These circumstances are distinct from *Barrio v Spain*, in that there was no systemic delay, want of procedural fairness, nor were all available remedies exhausted: [71] – [84].
- The Magistrates Court is not a "public authority" within the meaning of s 40 of the *Human Rights Act 2004* (ACT). The imposition of an order restraining a person's liberty is unquestionably a judicial function: [90].

Land law: Unregistered interests

***McNamee v McNamee & Anor* [2024] NTCA 1**

Decision date: 22 March 2024

Grant CJ, Kelly and Brownhill JJ

Lorna Pascoe, the mother of MM, CM and TM, holds the freehold estate in the land at 3A Neptuna Court, Larrakeyah (Property). MM and his daughter reside at the property. On 30 October 2021, Ms Pascoe suffered a stroke, and CM and TM were subsequently appointed legal guardians. On 21 March 2022, CM's and TM's solicitor wrote to MM withdrawing any consent of Ms Pascoe and requiring him to vacate the Property. MM refused to do so, and proceedings were commenced by CM and TM.

The primary judge held that, at its highest, MM's case was that he had a verbal agreement with Ms Pascoe permitting him to occupy the Property for a period in exchange for him undertaking work as a project manager while the Property was being built. It was held that this agreement could not constitute a lease as it did not contemplate that MM would have exclusive possession. Nor could the agreement constitute a tenancy under *Residential Tenancies Act 1999* (NT) because that Act does not apply to an agreement under which no rent is paid, and services are provided in return for the granting of a right to occupy. Ultimately, it was held that MM had a contractual licence which could be revoked by Ms Pascoe or her guardians (CM and TM), with such a revocation having been properly affected.

The Court held (Grant CJ, Kelly and Brownhill JJ), allowing the appeal, and remitting the matter to the registrar to fix a trial date:

- It follows from the decision in *Stephenson v Morgan* [1963] 80 WN(NSW) 1719 that an intention by MM and Ms Pascoe that she would or might occupy some part of the Property during the agreed period of MM's occupation is not necessarily inconsistent with an intention to grant MM a right of exclusive possession to at least part of the Property. The relevant question is whether it was the intention of Ms Pascoe and MM that MM would have, for the agreed period, exclusive possession of the Property or part thereof. The primary judge's finding that MM did not have exclusive possession because Ms Pascoe would or might live in the Property is incorrect: [51] – [53].
- MM's attempted recovery of the value of his project management work does not necessarily operate as a concession that the agreement constituted a mere licence, the revocation of which entitled him only to damages: [56].
- On MM's evidence, he and Ms Pascoe had a common assumption that he would have the right to live in the Property for six years and, in reliance on that assumption, he acted to his detriment by performing project management work for the build of the Property for a period of some two years. That evidence raises the possibility that he has a licence coupled with an equitable proprietary interest in the Property precluding, in principle at least, the termination of the licence by Ms Pascoe or her guardians before the expiry of the six-year duration: [58] – [61].

Asia Pacific Decision of Interest

Arbitrary detention: Judicial immunity

Attorney-General v Putua **[2024] NZCA 67**

Decision date: 21 March 2024

French, Courtney and Katz JJ

Mr Putua was sentenced to four and a half years imprisonment on 16 charges. When preparing Mr Putua's committal warrant, a deputy registrar incorrectly recorded in the draft warrant that a three-month sentence for one of the charges was cumulative, rather than concurrent. The sentencing judge did not notice this error and signed the warrant. Consequently, Mr Putua was imprisoned for 33 days in excess of the sentence that was imposed before the relevant authorities realised the mistake and issued a replacement warrant.

Mr Putua commenced proceedings in the High Court seeking a declaration that he had been arbitrarily detained in breach of his right under s 22 of the *New Zealand Bill of Rights Act 1990* (NZ). The claim did not seek to hold the Crown liable. It was limited to the actions of the deputy registrar. The primary judge held that Mr Mutua had been unlawfully, and therefore arbitrarily, detained, and awarded $11,000 in damages (together with interest).

On appeal by the Crown, the Court of Appeal considered whether the actions of the deputy registrar were subject to the same immunity as the actions of the sentencing judge, and even if not subject to the same immunity, did the sentencing judge's signing of the warrant constitute an intervening cause breaking the causal nexus between the drafting of the warrant and the arbitrary detention.

The Court held (French, Courtney and Katz JJ), allowing the appeal:

- The primary judge's finding, that there being two errors relating to this warrant, one of which is protected and the other not, is anomalous. The test of whether an act is judicial, such that it attracts immunity, is not answered by reference to the existence of a discretion, but rather turns on an analysis of the role of deputy registrars in the context of judicial business. Here, the task at issue was one of giving effect to a judicial decision and assisting the judge in the exercise of his statutory powers. This work comes within the ambit of the immunity under s 6(5) of the *Crown Proceedings Act 1950* (NZ), as well as the immunity at common law: [40] – [42], [46] – [49].
- The act of the judge did not constitute an intervening act breaking the causal nexus. Although not void of causative effect, the judge's actions were directly precipitated by, and within the scope of, the risk created by the deputy registrar's error, such that the mistake of the deputy registrar remained the operative cause of Mr Mutua's arbitrary detention: [79] – [92].

International Decision of Interest

First Amendment: Social media

***Lindke v Freed*, 601 U. S. (2024)**

Decision date: 15 March 2024

Roberts CJ, Thomas, Alito Jr, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett, Jackson JJ

Sometime before 2008, Mr Freed created a private Facebook profile. He later converted his profile to a public "page", meaning that anyone could see and comment on his posts. In 2014, Mr Freed updated his Facebook page to reflect that he was appointed city manager of Port Huron, Michigan, describing himself as "Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the Citizens of Port Huron, MO". His subsequent posts concerned a variety of personal and professional matters.

During the COVID-19 pandemic, Mr Freed posted about it. Some of these posts were personal, others contained information related to his job. Mr Lindke frequently commented on Mr Freed's posts, unequivocally expressing his displeasure with the city's handling of the pandemic. Initially, Mr Freed selectively deleted Mr Lindke's comments, but later entirely blocked him from commenting at all. Mr Lindke then sued Mr Freed under 42 U. S. C. §1983 alleging that Mr Freed had violated his First Amendment Right. The District Court held that because Mr Freed managed his Facebook page privately, and because only state action can give rise to liability under §1983, Mr Lindke's claim failed. This decision was reaffirmed by the Sixth Circuit.

The Court held (Roberts CJ, Thomas, Alito Jr, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett, Jackson JJ), remitting the matter back to the Sixth Circuit for further proceedings consistent with this opinion:

- A public official who prevents someone from commenting on the official's social media page is amenable to §1983 only if the official both (1) possessed actual authority to speak on the State's behalf on a particular matter, and (2) purported to exercise that authority when speaking in the relevant social-media posts.
- The first step is grounded in the requirement that "the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State" (*Lugar v Edmondson Oil Co*., 457 U. S. 922). The mere appearance of authority is insufficient, and instead the analysis must be conducted by reference to substance, not form.
- To the second step, if the official does not speak in furtherance of his official responsibilities, he is doing so privately. Here, the ambiguity surrounding the public/private distinction of Mr Freed's Facebook page demands a fact-specific assessment.