Court of Appeal
Supreme Court
Sydney

Decisions of Interest

13 February 2023 – 26 February 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

Equity: unconscionable conduct

Kimberley Developments Pty Ltd v Bale **[2023] NSWCA 25**

Decision date: 22 February 2023

Leeming and Kirk JJA and Griffiths AJA

In 2011, land in Forest Lodge, Sydney was transferred for a stated consideration of $590,000 from Mr Michel Schein to Kimberley Developments Pty Ltd a company whose sole director and shareholder at the time was Mr Albert Darwiche. The transfer was signed by Mr Schein and the purchaser company's solicitor, Mr Martin Churchill, and was witnessed by Mr Schein's wife, Ms Chyna Schein. Mr Darwiche and Mr Theofanis Trigas, the future director of Kimberley Developments, were also present when the transfer was signed. Other significant documents, such as an agreement for sale of land and a settlement sheet, could not be found. Banking records established that Mr Trigas' company, Super Start Batteries Pty Ltd, paid funds to discharge Mr Schein's debt to the mortgagee of the Forest Lodge property and to pay stamp duty. A formal joint venture agreement, signed by Mr and Ms Schein on the same day as they executed the transfer, provided that Mr Schein would receive 60% of the class B shares in the purchaser company. Those shares were never issued. The document was expressed to be between Mr Schein and Mr Darwiche, and was signed by Mr and Ms Schein, but not by Mr Darwiche. Mr Schein then died. Françoise Bale, Mr Schein's daughter, commenced proceedings in the Supreme Court, on behalf of the deceased's estate, seeking to have the transfer of land set aside. The primary judge set aside the transfer of land and ordered Kimberley Developments to re-transfer it to Ms Bale. The primary judge's finding that this agreement did not have contractual force was not challenged. It was common ground that the discharge of the mortgage and settlement of monies owed to Mr Darwiche comprised part of the $590,000 consideration for the land. Ms Bale contended that the remaining consideration was not paid, as no class B shares were issued in Kimberley Developments. The appellants said that the remaining consideration was provided and gave evidence that $302,000 in banknotes was given to the deceased and his wife, for which no receipt was obtained, and no banking records could be produced. The questions were whether the $302,000 had been paid, and whether Mr Schein suffered from a special disadvantage sufficient to engage equity's jurisdiction against unconscionable dealing.

Held: dismissing the appeal

- In equity, a party to a deed cannot set up an estoppel in reliance on a deed in relation to which there is an equitable right to rescission (*Greer v Kettle* [1938] AC 156): [52]-[54]. The respondent had made out a sufficient case for the burden to shift to Mr Darwiche and Mr Trigas to establish that they had paid $302,000 in banknotes to Mr Schein in 2011. It was therefore open to the primary judge to find that Mr Darwiche and Mr Trigas had failed to discharge that burden, and to conclude that $302,000 was not paid to Mr Schein in 2011: [58]-[61].
- The fact that Mr Schein was prepared to proceed to transfer title to the land without independent legal advice, without the usual incidents of a conveyance, and where all that was received was the discharge of existing indebtedness which was substantially less than the value of the Forest Lodge property, made it plain that Mr Schein was labouring under a special disadvantage which was unconscionably exploited by Mr Darwiche: [68]-[69].

Land Law: Torrens title; indefeasibility

***Huang v 18 Woodville Holding Pty Ltd; Tao v 18 Woodville Holding Pty Ltd* [2023] NSWCA 15**

Decision date: 15 February 2023

Meagher and Kirk JJA and Griffiths AJA

The appellants in the first proceedings, along with the second respondent developer and mortgagor Hua Cheng International Holdings Group Pty Ltd (in liq), had paid the purchase price for, and taken possession of, two apartments in a strata plan development, but had not yet been transferred the fee simple. The appellants in the second proceedings claimed to be in the same position as the appellants in the first proceedings. Both appellants commenced proceedings in the Supreme Court seeking orders for the specific performance of the three contracts for sale. The principal issue in both proceedings was whether the first respondent in both proceedings, 18 Woodville Holdings Pty Ltd, as the development's registered mortgagee, was entitled to take possession of those apartments in exercise of its power of sale. This depended on whether 18 Woodville's registered interest was paramount to any unregistered interests held by the appellants. The appellants relied on the fraud exception in s 42(1)(d) of the *Real Property Act 1900* (NSW) ("the Act"). The primary judge found that 18 Woodville's interest prevailed because the fact of registration made that interest indefeasible, and that by its terms the fraud exception did not apply to the appellants, because they were tenants at will at the time the interest was registered. The appellants in both proceedings appealed this decision.

Held: dismissing the appeal in both proceedings

- A tenancy for a term must be distinguished from a tenancy at will. Section 42(1)(d) does not apply to purchasers in possession who are tenants at will of the vendor : [40], [46]. This position can be distinguished from that in Victoria, in s 42(2)(e) of the *Real Property Act 1958* (Vic) in which the interests of such tenants may be protected under that State's equivalent legislation: [32]-[34]. The very different language of s 42(1)(d) and the legislative history, confirms that s 42(1)(d) is to be construed more narrowly and in accordance with its ordinary meaning: [35]-[39].

- Given that the appellants held their interests in the apartments under a tenancy at will, the Court found that the exception to indefeasibility set out in s 42(1)(d) of the Act did not apply, and therefore the first respondent's interest remained paramount to the interests claimed by the appellants. To the extent that their equity was an incident of the equitable interest of a purchaser in possession or entitled to immediate possession under an enforceable contract for sale, such an estate or interest was not within any exception to the indefeasibility of 18 Woodville's right to possession as mortgagee: [48], [53].

Insurance: meaning of "insured risk"

BCC Trade Credit Pty Ltd v Thera Agri Capital No 2 Pty Ltd **[2023] NSWCA 20**

Decision date: 20 February 2023

Macfarlan and White JJA and Basten AJA

In February 2020, the respondent, Thera Agri Capital No 2 Pty Ltd, provided $8m in trade finance to facilitate the purchase of Australian pulses and grains by two companies within the Phoenix Group. Payments to the respondent were guaranteed by the trading companies' parent company, Phoenix Commodities Pvt Ltd . The financing arrangement was in the form of a Sharia-compliant Master Murabaha Agreement. The appellant, BCC Trade Credit Pty Ltd , issued a trade credit insurance policy to the respondent. The policy identified the subject of the indemnity as advances made by the respondent under the Murabaha agreements. The transaction documents were executed on 13 February 2020. However, it was common ground that the arrangements for the purchase and supply of the commodities did not comply with the Murabaha agreements. Before the completion of the trading transactions the Phoenix Group collapsed, the parent company, Phoenix Commodities, being placed in liquidation on 20 April 2020. No repayments were made to the respondent. The respondent sought indemnity under the insurance policy. The appellant asserted that because the advances had not been made in accordance with the Murabaha agreements the policy did not respond. It rejected the claim. The respondent commenced proceedings in the Supreme Court claiming the losses were covered by the policy. The primary judge held that the policy did respond and gave judgment in favour of Thera. The insurer appealed that decision.

Held: dismissing the appeal

- The Insuring Clause, when taken with the definitions of "Debt Obligation(s)" and "Advanced Payment", applied to the contractual loss that the insured suffered. The use of the word "Advanced" was not significant because at times the policy lapses into the language of a conventional trade credit financing arrangement: [16], [53]-[54]. The definition of "Advanced Payment" could not be understood to govern the construction of the policy by informing the definition of "Debt Obligations" and as a result the definition of "Insured Risks": [55]. The insured's loss arose out of the non-fulfillment of contractual obligations of the counter-party (and guarantor) of the type described in the Exhibit A documents, and therefore as contemplated by the policy: [17].

- In dissent, Basten AJA held that the policy should be construed as a whole by giving each clause a meaning that would render it harmonious with the others: [113]. The elements of incoherence in the definitional provisions provided an inadequate basis for suggesting that payments could be advanced otherwise than in accordance with the terms and conditions provided in the Finance Documents: [119]. As the arrangements undertaken did not involve the purchase of commodities by Phoenix at the request of Thera and on behalf of Thera, there was no payment made with respect to such a transaction. The "Value Date" was defined in the Master Agreement as the date on which Thera provided funds to Phoenix to purchase the goods, that term was not satisfied: [143]. The obligation of Phoenix to repay an amount calculated as if the earlier transactions had taken place under the Master Agreement was not an obligation which arose "in accordance with" the Master Agreement: [144].

Corporations: s 423(1) of the *Corporations Act 2001* (Cth)

***Sahab Holdings Pty Ltd v Tonks* [2023] NSWCA 12**

Decision date: 15 February 2023

Macfarlan, Meagher and Kirk JJA

The appellant, Sahab Holdings Pty Ltd ("Sahab") was a trustee for two trusts. Sahab had entered into an agreement with Senses Northbridge Pty Ltd ("Senses") for the redevelopment of certain properties. A dispute arose and Senses commenced proceedings in the Supreme Court. There was a deadlock during the proceedings and Lindsay J appointed the two respondents, Mr Tonks and Mr Roufeil, as receivers and managers of the assets of the trusts and tasking them conducting the defence of the Senses litigation. Sahab, at the instigation of a family member of the trusts' beneficiaries, sought an order under s 423(1)(b) of the *Corporations Act 2001* (Cth) that the Supreme Court inquire into the conduct of those receivers. Sahab's application was rejected by the primary judge on the basis that "no prima facie case" for such an inquiry had been made out. Sahab appealed that decision.

Held: dismissing the appeal

- For an application under s 423(1)(b), the only express precondition for the discretion is that a person has complained to the Court (or ASIC) about some relevant act or omission of the controller. However, it is no doubt implicit that there must be something sufficient in the complaint calling for an inquiry. It is therefore better to avoid the language of "prima facie" case, as it risks setting too high a threshold. The ultimate issue is whether the Court is persuaded in all the circumstances an inquiry is warranted: [18]-[23].

- The primary judge did not err in concluding that, in the absence of agreement or leave of the Court, the receivers were obliged to defend the Senses proceedings. The receivers were obliged not to compromise the litigation. However, if they received legal advice advising them that the litigation could not properly be defended, their conflicting legal obligations could be resolved by seeking leave to compromise the proceedings: [96]-[100].

- The receivers did not act for an improper purpose insofar as they sought to use the litigation as a means to extricate Sahab from its agreement with Senses: [117]. The receivers were not acting beyond their role because they were not appointed solely to conduct the litigation, but to manage all property Sahab held on trust: [103]. Given that an appraisal and report found that the agreement suppressed the value of trust property by a considerable amount, it was appropriate for the receivers to consider whether the situation they were dealing with on behalf of Sahab provided an opportunity to improve the position of the trusts by getting out of what they regarded as a very bad deal: [104]. The receivers also obtained legal advice stating they had an arguable defence and reasonable prospects of success in the litigation: [111]. Accordingly, there was no evidence to suggest that the Court should inquire into the reasonable commercial decisions made by the receivers: [117].

Australian Intermediate Appellate Decisions of Interest

Permanent Stays; Claims for Damages for Child Sexual Abuse

RC v The Salvation Army (Western Australia) Property Trust **[2023] WASCA 29**

Decision date: 17 February 2023

Murphy and Vaughan JJA and Bleby AJA

the appellant ("RC") alleged that, in 1959 and 1960, Lieutenant Frank Swift , an officer of the respondent, sexually abused him while he was placed in the Nedlands's Boys Home. In 2018, RC began proceedings in the District Court of Western Australia seeking damages for breaches of common law and statutory duties by the respondent, and damages for intentional torts v by Lt Swift for which RC claimed that the respondent was vicariously liable. The proceedings were brought after the introduction of s 6A of the *Limitation Act 2005* (WA) which removed the limitation period for child sexual abuse actions. Following an application by the respondent, the primary judge granted a permanent stay on the basis that the respondent was unable to meaningfully defend the action due to the passage of time. RC appealed that decision.

Held: refusing leave to appeal

- The primary judge did not err in finding that Lt Swift had died before the respondent was able to investigate the claims: [59]. Although the applicant had complained to a Major Watson prior to the expiry of the then limitation period, at the time the action was brought, Major Watson had been dead for many years and there were no contemporaneous written records of the complaint or how Major Watson treated it. There was no contemporaneous record of any investigation into Lt Swift, who died in 2006: [78]-[79]. Therefore, the respondent did not have the material to challenge or even test the appellant's account: [80]-[86].

- The primary judge did not err in failing to consider whether the respondent would have investigated the appellant's allegations earlier and, if so, when, had it been aware of them: [121]. The hypothetical nature of such an inquiry would impose a vague and uncertain burden on a defendant to prove what it would have done at all points in history from the date of the claimed wrong to the present: [114]. However, where a defendant is fairly put on notice of a plaintiff's claims prior to the commencement of proceedings, any investigations undertaken may well be relevant in the context of the operation of s 6A of the *Limitation Act 2005* (WA) and the application for a stay: [116].

- The primary judge did not err in concluding that with the passage of time the respondent was prejudiced through the loss of documents and the ability to call witnesses: [165]-[166]. Although there was admissible evidence from other witnesses who claimed to have been abused by Lt Swift, in the absence of any evidence from Lt Swift, the capacity of the respondent to challenge these witnesses would be considerably diminished: [127]-[128], [139]. However, the primary judge did err in finding that an employment relationship between Lt Swift and the Salvation Army was needed to establish vicarious liability. Rather, questions of authority, power, trust, control and the ability to achieve intimacy with the victim are more relevant: [146]-[156], [164].

Taxation: goods and services tax

Commissioner of Taxation v Complete Success Solutions Pty Ltd ATF Complete Success Solutions Trust **[2023] FCAFC 19**

Decision date: 23 February 2023

Moshinsky, Thawley and Hespe JJ

Complete Success Solutions Pty Ltd as trustee for Complete Success Solutions Trust ("CSS") ran a business of purchasing scrap gold, paying a contract refiner to refine the gold and selling the resulting bullion to ABC Refinery (Australia) Pty Ltd ("ABCRA") or La Gajjar Pty Ltd without CSS ever taking possession of the scrap gold or bullion. During this process, La Gajjr Pty Ltd provided consultancy and operational services to CSS. The Commissioner of Taxation appealed from a decision of the Administrative Appeals Tribunal. CSS cross-appealed. The issue was CSS' entitlement to input tax credits under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ("the GST Act") in two periods. The Tribunal found that CSS was entitled to input tax credits on the acquisition of scrap gold and not liable for GST on its export supplies of scrap gold. The first period was 1 August 2016 to 30 November 2016 in which CSS claimed it produced GST-free supplies of precious metal (gold bullion) and was therefore entitled to input tax credits for the scrap gold it had acquired and refined into that bullion. The second period was 1 December 2016 to 31 January 2017 in which CSS claims to have made GST-free export sales of scrap gold and to be entitled to input tax credits for its acquisition of that scrap gold. Before the Tribunal, the Commissioner argued that CSS was not entitled to input tax credits during either period and alternatively, that Div 165 of the GST Act enabled the Commissioner to make a declaration denying CSS a GST benefit, namely the input tax credits for the acquisition of scrap gold.

Held: allowing the appeal and cross-appeal

- The Tribunal erred in finding that CSS had not discharged its burden of proving that ABCRA and La Gajjar were dealers in precious metal within the meaning of the GST Act where the Commissioner did not produce relevant documents. Given the Commissioner's concession that the documents indicated a principal part of ABCRA's business was the regular supply and acquisition of precious metal, the matter ought to be remitted to the Tribunal for reconsideration of issues concerning the first period: [44]-[47].
- The Tribunal failed to complete the statutory task required by s 165-5(1)(c) of the GST Act because it failed to separately examine each entity's purpose whether in the context of the scheme as a whole or in relation to particular parts of the scheme: [75]-[80], [94]-[122].
- It was unclear whether the Tribunal reached its factual conclusion about Manila Exchange's (the entity acquiring gold bullion under a GST-free supply during the first period) dominant purpose by excluding the possibility that its purpose, ascertained in accordance with Div 165, was to ensure that CSS could obtain input tax credits on a GST-free sale, or that the purpose of obtaining GST and the purpose of obtaining input tax credits for CSS were inextricably linked such that it constituted one purpose: [85].
- The Tribunal failed to properly address s 165-5(1)(c)(ii), being the principal effects of part of the scheme. If the Tribunal had considered the effect of the part of the scheme involving PM Melt Service Pty Ltd, it may have concluded that principal effect of that part of the scheme was to secure input tax credits for CSS: [123]-[125].

Asia Pacific Decision of Interest

Māori Freehold Land; Equity: constructive trusts

Nicholas v Te Amo **[2023] NZCA 22**

Court: Court of Appeal of New Zealand

Decision date: 16 February 2023

Miller, Courtney and Simon France JJ

A block of Māori freehold land was part of the Te-Whaiti-Nui-A-Toi block, which was owned by trustees of the Te-Whaiti-Nui-A-Toi Trust, of which the appellant, Mrs Nicholas, was a beneficiary. The Te Whaiti-Nui-A-Toi block was vested in the Māori Trustee who leased it to the Ministry of Forestry until 2066. Mrs Nicholas moved a house onto the land in 1989 and made improvements to the house over several years. Initially, her whānau or "extended family group" held a licence to occupy the house; however this expired in 2012. The trustees applied to the Māori Land Court for an injunction prohibiting Mrs Nicholas from occupying the house and requiring her to remove it. Mrs Nicholas cross-applied under s 18(1)(a) of the *Te Ture Whenua Māori Act 1993* (NZ) ("the Act") for a determination that she has "an equitable interest in the land in the nature of ownership rights in a building constructed upon the land" and asserted that these ownership rights include the right to access and occupy the house. The Māori Land Court found that the house was owned by the trustees, subject to any equitable interest Mrs Nicholas could prove. However, an order under s 18(1)(a) determining ownership rights did not carry a right of possession or occupation unless, as a result of the trustee's actions, Mrs Nicholas had formed a reasonable expectation that she was entitled to occupy the house. The trustees had not created any such expectation. The injunction was granted. Mrs Nicholas appealed the Māori Appellate Court's affirmation of that decision.

Held: allowing the appeal

- The Māori Appellate Court erred in treating the appeal as one against the discretion of the Māori Land Court, as opposed to a right of general appeal, because the determination of equitable interests is not discretionary: [7]-[8].

- The Courts below erred in finding that the trustees had not created a reasonable expectation that Mrs Nicholas was entitled to occupy the house. The conditions upon which the trustees approved the issuing of the licence included that the licence to occupy would persist until the forestry lease expired in May 2066 and that from June 2066 the future of the building would depend on whoever owns the land on31 May 2066. These terms amounted to a representation that Mrs Nicholas would be entitled to occupy the house until May 2066, even if the forestry lease were to end before then: [36]-[40].

- The Māori Appellate Court erred in holding that Mrs Nicholas' right of ownership did not carry with it a right of occupation because she had not contributed to the land on which the house stood: [41], [52]-[53]. That was because: first, both of the courts below have long accepted as applicable to Māori freehold land the common law position that a structure affixed to land may become part of the land, and if that is the case, be owned by the legal owners of the land; secondly, it has also long been the position in the Māori Land Court jurisdiction that the interests of the legal owners are subject to equitable interests; and thirdly, in cases under s 18(1)(a)'s predecessor, s 30(1)(a) of the *Māori Affairs Act 1953* (NZ), the Māori Land Court expressly said that where a co-owner of multiply owned Māori freehold land builds a house with the acquiescence of their co-owners, they acquire exclusive possession of the part of the land the house stands on: [48]-[51].

International Decision of Interest

Bankruptcy; Statutory Interpretation

Bartenwerfer v. Buckley **(No 21-908, 22 February 2023), slip op 4**

Court: Supreme Court of the United States

Decision date: 22 February 2023

Barret, Sotomayor and Jackson JJ

David and Kate Bartenwerfer renovated a house they jointly owned in San Francisco. David took charge of the project and Kate remained largely uninvolved. They sold the house to Kieran Buckley, the respondent. Kate and David attested that they had disclosed all material facts related to the property. After the purchase, Buckley discovered several undisclosed defects, commenced proceedings in the California state court and was awarded $200,000 in damages. Kate and David filed for bankruptcy. Buckley filed an adversary complaint in the bankruptcy proceeding, alleging that the $200,000 debt was the product of fraud and therefore non-dischargeable under s §523(a)(2)(A) of the *Bankruptcy Code* 11 U.S.C ("the *Code*"). The Bankruptcy Court found that David had committed fraud and imputed his fraudulent intent to Kate. The Bankruptcy Appellate Panel disagreed, holding that §523(a)(2)(A) barred Kate from discharging the debt only if she knew or had reason to know of David's fraud. The Bankruptcy Court determined, and the Bankruptcy Appellate Panel agreed, that Kate lacked such knowledge. The Ninth Circuit reversed that decision on the basis that a debtor who is liable for her partner's fraud cannot discharge that debt in bankruptcy, regardless of her own culpability (*Strang v Bradner*, 114 U. S. 555 ("*Strang*")). Kate appealed that decision.

Held: dismissing the appeal

- The passive voice in §523(a)(2)(A) does not hide the relevant actor in plain sight but rather removes the actor altogether. Although context can confine a passive-voice sentence to a likely set of actors, the common law of fraud has long maintained that fraud liability is not limited to the wrongdoer: pp. 4-5. Kate submitted that "'exceptions to discharge should be confined to those plainly expressed.'" The Court, however, has never used this principle to artificially narrow ordinary meaning, invoking it instead to stress that exceptions should not extend beyond their stated terms: pp. 6. Sections 523(a)(2)(B) and (C), which require some culpable action by the debtor herself, do not provide any assistance due to the rule that "'[w]hen Congress includes particular language in one section … but omits it in another section of the same Act,'" the Court generally takes "the choice to be deliberate." It would not defy credulity to think that Congress would bar debtors from discharging liability for fraud they did not personally commit under (A) while allowing debtors to discharge debt for fraudulent statements they did not personally make under (B): pp. 7–8.

- At p 561 in *Strang*, the Court held that the fraud of one partner should be imputed to the other partners, who "received and appropriated the fruits of the fraudulent conduct." The Court so held despite the fact that the relevant 19th-century discharge exception for fraud disallowed the discharge of debts "created by the fraud or embezzlement of the bankrupt." When Congress next overhauled bankruptcy law, it deleted the phrase "of the bankrupt" from the discharge exception for fraud, implying that Congress embraced *Strang*: pp. 8–10.

- The *Code* is not focused on the unadulterated pursuit of the debtor's interest, and instead seeks to balance multiple, often competing interests. Section 523(a)(2)(A) does not define the scope of one's liability for another's fraud, but rather takes the debt as it finds it, so if California did not extend liability to honest partners, §523(a)(2)(A) would have no role here: pp. 10–12.