Court of Appeal
Supreme Court
Sydney

Decisions of Interest

13 March 2023 – 26 March 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 2

Australian Intermediate Appellate Decisions of Interest 6

Asia Pacific Decisions of Interest 8

International Decision of Interest 9

New South Wales Court of Appeal Decisions of Interest

Taxes and Duties: payroll tax

***Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWCA 40**

Decision date: 14 March 2023

Meagher, Leeming JJA and Griffiths AJA

Thomas and Naaz Pty Ltd operated a business comprised of three medical centres. The medical practitioners who worked at the centres agreed in writing to "bulk bill" for all medical services provided to their patients at the centres, and to pay 30% of the total billings to Thomas and Naaz. All medical practitioners, save three, had an informal arrangement where payments from Medicare were paid directly to Thomas and Naaz, which then paid 70% to the practitioners, retaining the other 30% for itself. The Chief Commissioner of State Revenue assessed payroll tax on the basis that the 70% paid by Thomas and Naaz to medical practitioners contributed to "taxable wages" under the *Payroll Tax Act 2007* (NSW). The NSW Civil and Administrative Tribunal constituted by a Senior Member rejected Thomas and Naaz' challenge to the assessments.. The Appeal Panel dismissed an appeal from the Senior Member's decision on the basis that the challenges did not give rise to any question of law. Thomas and Naaz sought leave to appeal that decision.

Held: refusing leave to appeal

- The Senior Member was correct to find that the medical practitioners provided services to Thomas and Naaz by attending to patients at the centres and thereby enabling Thomas and Naaz to operate its business: [41], [47]. It was submitted that the medical practitioners could not provide a service to the applicant in circumstances where medical treatment was "incapable of being supplied to the applicant" and where there was no way to "characterise the patients as customers or patients of the applicant". However, neither of those propositions was fatal to the conclusion that the medical practitioners provided a service to the applicant. Nor did anything turn on the fact that "supply" is given an expanded definition in the Act: [46]. The payments were "for or in relation to the performance of work" which related to the contract between the applicant and the medical practitioners: [61]. Thus, the payments contributed to Thomas and Naaz' taxable wages for the purposes of payroll tax: [63]-[64].

- No question of law was raised before the Appeal Panel. Further, no question of law arose in the present case, save for the assertion that the Appeal Panel failed to exercise its jurisdiction. But while that *could* amount to a question of law, it did not here because the Appeal Panel had addressed every ground of appeal: [48], [58], [65].

- The calculation of assessable wages did not include the three medical practitioners who processed their own claims for Medicare benefits, and who therefore remitted 30% of what they received to the applicant rather than receiving 70% *from* the applicant. This did not show that the construction adopted by the Chief Commissioner was absurd or capricious. Division 7 of Part 2 extends the concepts of "employer", "employee" and "wages" so as to artificially expand the basis upon which payroll tax is assessed: [67].

Taxes and Duties: land tax; exemptions

Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd **[2023] NSWCA 44**

Decision date: 20 March 2023

Kirk JA, Simpson and Griffiths AJJA

The respondent, Godolphin Australia Pty Ltd , runs a business involving the breeding, sale and racing of thoroughbred racehorses. In assessing land tax payable on two properties owned by Godolphin, the appellant, the Chief Commissioner of State Revenue, refused to apply the exemption for land used for primary production Godolphin sought review in the Supreme Court. The question was whether the dominant use of the lands was maintaining animals for the purpose of selling them, their natural increase or their bodily produce, or whether the dominant use was racing and breeding activities. The Commissioner argued that the dominant use was the latter, such that the properties were outside the exemption in s 10AA(3)(b) of the *Land Tax Management Act 1956* (NSW). Godolphin submitted that in its business model for the relevant land, racing and the sale of breeding services, broodmares and progeny "are complementary or mutually reinforcing", and that "the purpose of sale and the purpose of racing are two aspects of a single composite purpose". The primary judge upheld Godolphin's objection and revoked the relevant land tax assessments. The Commissioner appealed that decision.

Held: allowing the appeal

- In relation to s 10AA(3)(b), it was accepted that the dominant use of the land was the maintenance of animals. Godolphin contended that "use" and "purpose" could be distinguished. To construe s 10AA(3)(b) in this way would render any purpose, no matter how insignificant in the overall use of the land, sufficient to attract the exemption provided by s 10AA(3). This construction is not indicated by either the terms of the provision or by its statutory purpose: [159]. In previous decisions under s 10AA(3)(b) the Court has steered away from separating the concepts of "use" and "purpose". It appears also to have been accepted (to the extent that it is appropriate to separate the two) that the requirement of dominance applies to both use and purpose: [132]. Thus, the question was not simply whether the land's dominant use could later be characterised as for a purpose of sale. Rather, the question was whether the land's use could be characterised as the land's dominant use was for the purpose of selling animals, progeny and produce: [27]-[32].

- Godolphin established that a significant use of the two properties was animal maintenance for the purpose of selling animal produce and progeny. However, the more significant use of the land was animal maintenance for the purpose of racing. Although each purpose supported the other to some extent, the activities undertaken on the land, the areas set aside for those activities, the intensity of those activities and the resources directed to the relevant purposes together indicated that the dominant use of the land in the relevant tax years was for the racing purpose *not* the saleof animal produce and progeny : [125]. To avail itself of the exemption in s 10AA(3)(b) Godolphin had to establish that the breeding purpose predominated over the racing purpose. It did not do so: [154].

- In dissent, Griffiths AJA emphasised the central and unusual feature of Godolphin's business operations on the relevant land, namely its integrated nature: lies: [166], [197]-[198]. The primary judge correctly characterised Godolphin's business as an integrated operation in which the preparation of horses for racing caried the dominant purpose of increasing the revenue from the sale of bodily produce and from the sale of the progeny produced by the broodmares: [223].

Damages: future economic loss; Burden of Proof

Jennings v Wilden **[2023] NSWCA 41**

Decision date: 14 March 2023

Meagher and Mitchelmore JJA and Basten AJA

Ms Wilden commenced proceedings against her former husband, Mr Jennings, in the District Court in February 2020. Ms Wilden alleged that Mr Jennings had raped her on four occasions, causing her to suffer injury in 2014 and 2015. The first incident occurred on 12 October 2014, when Mr Jennings arrived home in the early hours of the morning, smelling of alcohol and cigarettes. Ms Wilden said he forced her to engage in sexual intercourse without her consent. All subsequent incidents occurred similarly. The trial took place in 2021 in the District Court. The trial judge accepted the plaintiff's claims and awarded just under $500,000 in damages, including $100,000 for future economic loss. Mr Jennings appealed against liability and the assessment of future economic loss.

Held: dismissing the appeal

- Although the trial judge asked whether the plaintiff's evidence was "glaringly improbable" or "contrary to compelling inferences" this was not, in context, an application of the standard for appellate review of evidence or a reversal of the onus of proof. In accordance with established principle, his Honour referred to only the plaintiff's evidence in that way because she bore the onus of proof and it was her allegations of criminal misconduct which might be thought implausible, rather than the defendant's denials: [19]. Immediately following the impugned passage, the judge referred to the basic principles as to the burden of proof, the fact that the allegations were of criminal acts, that they were "very serious", and therefore should not readily be accepted: [21] The trial judge found that the plaintiff was a careful and reliable historian who gave evidence with clarity. Having regard to the evidence given by the plaintiff about the text messages, the judge found her entirely persuasive and that her account was neither "glaringly improbable" nor "inherently unlikely": [25]–[27]. There was no reversal of the onus of proof, but a careful assessment of the plaintiff's evidence against a range of tests, including consideration of the possibility that they might inherently be so improbable as not to warrant acceptance: [28].

- On the assessment of damages, the plaintiff was able to work but the psychiatric evidence suggested her capacity for employment had been decreased by the assaults:[37]–[38]. The trial judge took into account that, prior to the assaults, the plaintiff suffered from a generalised anxiety disorder which may have impacted her future earning capacity regardless of the assaults. However, the PTSD would be likely to have an impact on her future work capacity: [39]–[41]. The amount awarded by the trial judge for future economic loss was not excessive, in the sense that it was not beyond the range which could reasonably be considered, having regard to Ms Wilden's expected 37 years of employment and the unchallenged finding of PTSD: [43].

Equity: fiduciary duties; remedies

***Xiao v BCEG International (Australia) Pty Ltd* [2023] NSWCA 48**

Decision date: 23 March 2023

Gleeson and Mitchelmore JJA and Griffiths AJA

BCEG International (Australia) Pty Ltd was engaged in two property development projects: the Varsity Lakes project and the Wagga project. The first and second appellants (Mr Xiao and Ms Chen) were the Australian-based directors of BCEG, and also engaged in their own development project, the West Wyalong project, which was conducted through one of their companies, West Wyalong Marketplace Pty Ltd ("WWM"). BCEG received US$35m in finance for the Varsity Lakes project by way of an on-lending arrangement with its foreign parent company. Without the authorisation of BCEG, Mr Xiao and Ms Chen caused $3.4m of this sum to be diverted to WWM to fund the West Wyalong project. BCEG engaged Trojjan Constructions Pty Ltd to build the Wagga project on land owned by Interlink Wagga Central Pty Ltd ("IWC"), which were both companies controlled by Mr Xiao and Ms Chen. The Supreme Court found that: Mr Xiao and Ms Chen breached their fiduciary duties owed to BCEG by diverting the Varsity Lakes funds to WWM ; WWM was a knowing recipient of these payments; and if BCEG had known that Mr Xiao and Ms Chen had diverted funding for the Varsity Lakes project to the West Wyalong project, then BCEG would not have entered into subsequent transactions in relation to the Wagga project with IWC and Trojjan. The primary judge awarded BCEG equitable compensation from Mr Xiao and Ms Chen in respect of BCEG's losses on the Wagga project and ordered an account of profits from IWC.

Held: allowing the appeal in part

- BCEG was entitled to make a "split election" seeking equitable compensation from the defaulting fiduciaries and an account of profits by the knowing recipients. The principle that a plaintiff cannot obtain equitable compensation and an account of profits from a single defendant has no application to a split election against multiple wrongdoers whose liabilities differ in nature and extent. A gain-based remedy against the knowing recipient is not inconsistent with a compensation remedy against the defaulting fiduciary: [68]–[70], [84]. The appellants were not denied procedural fairness by the primary judge undertaking the account of profits at the trial stage. The appellants were on fair notice of BCEG's case against WWM for an account of profits and made a forensic choice not to deal with the quantum aspect of BCEG's claim: [102]–[105].

- As to causation, disclosure by a fiduciary of a conflict of interest is not a positive obligation, but rather a defence to what would otherwise be a breach of duty. Hence, Mr Xiao and Ms Chen's failure to obtain BCEG's informed consent to the diversion of the Varsity Lakes money to the West Wyalong project did not constitute a breach of fiduciary duty: [126], [144]. The breach of duty was the dissipation of BCEG's funds to the West Wyalong project in circumstances where there was a conflict between Mr Xiao and Ms Chen's personal interests through their interests in WWM and their duties to BCEG: [132]. The primary judge erred in finding a causative connection between the breaches of fiduciary duty and the later losses suffered by BCEG on the Wagga project, based on evidence of BCEG's China-based directors that if they had known of the diversion of funds from the Varsity Lakes project they would not have entered into later transactions with IWC and Trojjan in relation to the West Wyalong project: [144]–[145].

- Although not necessary to decide, the primary judge did not err in relying upon BCEG's financial statements as sufficient evidence of its loss on the Wagga project: [154]–[160].

Australian Intermediate Appellate Decisions of Interest

Contract: restraint of trade

Kingdom Animalia LLC v Mecca Brands Pty Ltd (ACN 077 859 931) **[2023] VSCA 55**

Decision date: 17 March 2023

Niall, Sifris and Macaulay JJA

In 2015 the applicant ("Hourglass"), an American cosmetics manufacturer, and the respondent ("Mecca"), an Australian cosmetics importer and retailer, renewed an earlier agreement made between them in 2010 (with some variations) for a further term. Under the 2015 exclusive distribution agreement ("the EDA"), Hourglass agreed to fulfil any orders made by Mecca for the supply of Hourglass' cosmetics, and Mecca agreed to sell and distribute Hourglass' cosmetics in Australia and New Zealand ("the territory"). By cl 1 of the EDA, for the duration of the agreement Hourglass agreed not to give any other person the right to purchase Hourglass' products for distribution and resale in the territory and further agreed to refer to Mecca orders received for its cosmetics from any customer in that territory. Clause 16.4 allowed either party to terminate if the other party, because of something beyond its controlled, failed to comply with the EDA for a period that was meant to be specified in writing, but never in fact was. Hourglass commenced proceedings in the Supreme Court of Victoria alleging that the EDA was an unlawful restraint of trade and that cl 16.4 was void for uncertainty and not severable, such that the entire agreement was void. The primary judge rejected both arguments and found in favour of Mecca. Hourglass sought leave to appeal that decision.

Held: granting leave to appeal but dismissing the appeal

- The primary judge was correct to find that the restraint was reasonable. It was unnecessary to consider the existence and content of a threshold test, being whether the restraint of trade doctrine applies at all to the contract in question so as to require the covenantee to justify the reasonableness of the restraint: [22]-[25].
- The primary judge did not err in identifying Mecca's legitimate interest as protecting its end-to-end service model, recovering its outlay of money for the benefit of its brands and ensuring that the benefit of the goodwill so created remained harnessed to Mecca for as long as it provided its service: [36], [41], [47]. There was no need for the legitimate interest to be identified by reference to specific obligations imposed on the covenantee: [38]. Typically, the legitimate interest of the party receiving the benefit of a restraint of trade is expressed broadly, and reflects the broad commercial objectives of that party discernible from the nature of its business and the character of the transaction under which the restraint arises: [39]-[40].
- A restraint is to be assessed in the context of all of the provisions of the agreement, and against the way it could operate in the various contingencies which the terms of the agreement envision, at the date of the making of the agreement. This assessment should be undertaken with the application of some commercial and pragmatic good sense: [59]-[61]. Even if the restraint could be used to avoid competition, such an outcome would not arise from the natural and probable exercise by Mecca of the powers the contract conferred upon it: [62]-[67].
- The primary judge did not err in severing cl 16.4 and failing to find that the entirety of the agreement was void for uncertainty. The standalone nature of the entitlement, the highly unusual circumstances in which it would operate, and the principal benefits secured by the parties by the remaining provisions of the EDA, indicate that the parties intended the operation of the EDA not to be conditional upon cl 16.4 taking effect: [88]-[90].

Trusts: discretionary; lost trust deed

Vanta Pty Ltd v Mantovani **[2023] VSCA 53**

Decision date: 16 March 2023

Kyrou and Sifris JJA and J Forrest AJA

The application for leave to appeal was brought by the adult sons of Vincenzo Mantovani and Teresa Mantovani, who are deceased. Two of the sons, Nicola ("Nic") and Salvatore ("Rocky"), are directors of Vanta Pty Ltd. Vanta was the trustee of the Mantovani Family Trust. Vanta, Nic and Rocky were the applicants for leave to appeal. Giovanni ("John") (first respondent), another son, was neither a shareholder nor a director of Vanta. The remaining brother Carmine was not part of the proceedings. The brothers, Teresa's grandchildren, and any grandchildren of the brothers were the beneficiaries of the Trust. Vanta owned multiple residential and commercial properties in Cobram, from which it derived income. In one way or another, the properties were transferred by Teresa to Vanta. In the 10 years preceding November 2021, Vanta made distributions solely to the directors, Nic and Rocky. It made no distribution to John or his children. He became dissatisfied and sought access to the Trust's records. Vanta denied this. John commenced proceedings in the Supreme Court. During the proceeding, and before it reached trial, it became clear that the original trust deed, and any true copy, had gone missing. John sought declarations that, in the event the deed could not be located, all assets held by Vanta were held subject to a resulting trust in favour of Teresa's estate, and sought an order for the taking of accounts. The judge upheld John's claims. Vanta appealed that decision.

Held: granting leave to appeal and allowing the appeal

- *Maks v Maks* (1986) 6 NSWLR 34, which established an evidentiary standard of "clear and convincing proof" for proving a deed's contents, was a decision made under the common law prior to the introduction of the *Evidence Act 1995* (NSW) ("the Act"), which is identical to the Victorian Act in the relevant respects. Following the introduction of the Act, judges of the Supreme Court of New South Wales cautioned against glosses on the clear provisions of the statute: [70]-[73]. The issue should be determined by reference to the balance of probabilities as imposed by s 140 of the Act: [74]-[76], [81]-[83].

- The primary judge erred in finding that the Trust should fail for uncertainty: [110], [128]-[129]. The essential terms of a valid and subsisting discretionary trust require: certainty of intention, certainty of subject matter, and certainty of object: [96]-[102]. The secondary evidence, being the Trust's schedule and its records, revealed the essential terms of the Trust and met the "three certainties" test: [103]-[108]. Despite the lack of secondary evidence about the management powers of the trustee and the date of vesting, the Trust did not fail for uncertainty for three reasons: a court should be hesitant in declaring a trust void for uncertainty because in doing so it is likely that the settlor's intentions will be frustrated; the "three certainties" had been satisfied; and there is scope for the Court to "fill the gap" in cases where there is uncertainty about the exact non-essential terms: [110]-[116]. The primary judge erred in applying the resulting trust remedy as it was unnecessary in the circumstances and its application was inconsistent with established legal principles: [135]-[136]. The remedy of a resulting trust applies in relation to real property in two circumstances,: where the transferor of property is presumed not to intend to transfer beneficial ownership to the transferee; or automatically in certain circumstances not dependent on intention. Neither of these circumstances applied: [137]-[143]. Therefore, it was unnecessary to consider whether a taking of accounts should be ordered: [153].

Asia Pacific Decision of Interest

Constitution; Tribunals

Union of India v Parashotam **[2023] INSC 447**

Decision date: 21 March 2023

Court: Supreme Court of India

Hon'ble Mr. Justice Sanjay Kishan Kaul, Hon'ble Mr. Justice Abhay S. Oka, Hon'ble Mrs. Justice B.V. Nagarathna

The *Armed Forces Tribunal Act 2007* (India) ("the Act") came into effect on 15June 2008. The Act established the Armed Forces Tribunal, a forum for judicial appeal on points of law and facts against verdicts of the Court Martial in relation to service matters brought by defence personnel. When the Act entered into force, there was a question whether an order made by the Armed Forces Tribunal would be amenable to challenge in the writ jurisdiction under Art 226 of the Constitution of India before any of the High Courts. This appeal concerned 13 matters all of which turned on the resolution of that question.

Held: declaring that there is no restriction *per se* on the exercise of power under art 226 of the Constitution

- The importance of the role performed by the Armed Forces Tribunal and its distinct jurisdiction means that jurisprudential principles applying to other tribunals may not apply: [23]-[24]. Despite this, the decision of *Union of India v Major General Shri Kant Sharma* (2015) 6 SCC 773 which sought to put an embargo on the exercise of Art 226 writ jurisdiction and thus dilute a significant provision of the Constitution, should not be followed. Art 226 forms part of the basic constitutional structure, whose principles are often referred to as an ultimate test. However, the High Court's self-restraint under Art 226 of the Constitution is distinct from an embargo: [4], [25].
- In *L. Chandra Kumar v Union of India & Others* (1997) 3 SCC 261, the principles of "tribunalisation" under Art 323A or Art 323B of the Constitution were upheld and the Bench was of the view that decisions of tribunals would be subject to the jurisdiction of the High Court under Art 226. Therefore, the power of the High Court under Art 226 of the Constitution is not inhibited, and superintendence and control under Art 227 are somewhat distinct from the powers of judicial review under Art 226: [26]. To deny the High Court power to correct any error which the Armed Forces Tribunal may fall into, even in exercising jurisdiction under Art 226, would be against the constitutional scheme: [28]-[29]. If there is a denial of a fundamental right under Part III of the Constitution or a jurisdictional error or error apparent on the face of the record, the High Court can exercise its jurisdiction: [30].

International Decision of Interest

International Law: countermeasures; Agency: ostensible authority

The Law Debenture Trust Corporation plc v Ukraine **[2023] UKSC 11**

Decision date: 15 March 2023

Court: United Kingdom Supreme Court

Lord Reed, President, Lord Hodge, Deputy President, Lord Lloyd-Jones, Lord Kitchin, Lord Carnwath

The Law Debenture Trust Corporation plc (the "Trustee") is trustee of notes with a nominal value of US$3 billion carrying interest of 5 per cent per annum. The notes were issued by Ukraine in 2013. They were constituted by a trust deed to which the Trustee and Ukraine were named parties. The sole subscriber of the notes was the Russian Federation. The principal amount of the notes fell due for payment, together with the last instalment of interest, in 2015. However, Ukraine refused to make payment. The Trustee commenced proceedings for payment. Ukraine filed a defence that resisted payment on various grounds. The Trustee applied for summary judgment which was granted by the High Court of Justice. The Court of Appeal overturned that decision. The Trustee appealed that decision.

Held: dismissing the appeal

- As a sovereign state which is recognised as such by the UK government, Ukraine is a legal person with full capacity in English law: [20]-[26]. It was not therefore arguable that it lacked the capacity to issue the notes or to enter into the related contracts: [34]. The capacity of a sovereign state in English law cannot be restricted by a state's constitution or domestic law because it derives from the state's recognition by the UK government: [29].

- Ukraine's Minister of Finance had ostensible authority to sign the trust deed and related documents and to issue the notes on Ukraine's behalf. The Cabinet of Ministers of Ukraine had ostensible authority to pass a resolution authorising the Minister of Finance to proceed with the transaction: [116]. If a state represents that a person has authority to act on its behalf, it will be bound by the acts of that person with respect to anyone dealing with him as an agent on the faith of that representation: [82]-[90]. The Trustee was not put on inquiry that the Minister of Finance might not have actual authority: [91]-[113].

- Ukraine's allegations of duress concerned both economic pressure and threats to use force to destroy Ukraine's security and territorial integrity. These allegations amounted to duress of the person and duress of goods: [145]-[170]. Whether Russia's threatened use of force imposed what English law regards as illegitimate pressure on Ukraine to enter into the trust deed and related contracts is a justiciable question because the court can answer it without determining the validity of Russia's acts under international or domestic law: [171]-[193]. In dissent, Lord Carnwath held that it was unnecessary to separate the economic from the physical threats, and that international legal standards are relevant to determining whether the conduct of one state towards another amounts to duress under English law: [217]-[221].

- Ukraine's case on countermeasures was irrelevant to the determination of the rights and duties arising under English law in relation to the notes: [207]. Ukraine had no arguable defence in these proceedings based on any right it may have had in international law due to the principle of non-justiciability: [204], [207]-[208]. In dissent, Lord Carnwath would have allowed the defence of countermeasures to proceed to trial because the criteria for availability of the defence of countermeasures in international law are satisfied and the principle of non-justiciability may be departed from in this exceptional case: [224]-[227].