Court of Appeal
Supreme Court
Sydney

Decisions of Interest

17 July 2023 – 30 July 2023

Summaries of recent decisions of the New South Wales Court of Appeal, other Australian intermediate appellate courts, Asia Pacific appellate courts and other international appellate courts, with the aim of collecting and promoting awareness and accessibility of particularly significant recent decisions.

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New South Wales Court of Appeal Decisions of Interest

Consumer Law: pyramid schemes; Tendency Evidence

***Gan v Xie* [2023] NSWCA 163**

Decision date: 17 July 2023

White AJA, Simpson and Basten AJJA

In 2016, Ms Gan invested approximately $305,150 and RMB805,000 in a platform ("MFC") which was operated by MBI International Sdn Bhd. In exchange, Ms Gan received credits that could be sold to existing or new members of MFC, and the ability to earn a number of bonuses when introducing new members. Ms Gan asserted that she invested in MFC as a result of misrepresentations made by Ms Xie regarding the legitimacy of MFC's operations, the profitability of investing in MFC and the safety of the invested funds. After Ms Gan joined MFC, it collapsed. Ms Gan commenced proceedings asserting that MFC was a pyramid scheme under s 45(1) of the *Australian Consumer Law* ("ACL") and Ms Xie had participated in a pyramid scheme, contravening s 44(1) of the ACL, by making the misrepresentations. The primary judge dismissed Ms Gan's claims.

Held: allowing the appeal

- MFC did meet the description of a pyramid scheme under s 45(1) of the ACL. Whether a scheme has the characteristics of a pyramid scheme proscribed by s 45(1) is to be determined by the scheme's objective features and not by reference to the participants' subjective understanding of the nature and operation of the scheme: [42]-[43]. Funds invested by new participants in the scheme provided a financial benefit to existing participants by enabling the conversion of otherwise irredeemable credits into legitimate currency and the prospect of receiving a financial benefit in the form of bonuses, upon the referral of further participants to the scheme substantially induced, objectively, new participants to provide that financial benefit: [32]-[43].
- An appellate court may intervene upon a trial judge's findings of fact or credit if the trial judge treated the evidence and made credit findings in an erroneous manner, including by failing to refer to factors that the appellate court considers significant: [24]. The primary judge findings of fact failed to take account of, and were inconsistent with, contemporaneous documentary evidence that supported Ms Gan's contention that Ms Xie had made certain misrepresentations to her about MFC: [24], [52]-[69], [79]-[80].
- The tendency evidence that Ms Gan had sought to lead from other investors in MFC had probative value and should have been admitted, because it bore upon the probability that Ms Xie had made similar misrepresentations made to other investors to Ms Gan. The fact that the other investors could not recall the conversations they had with Ms Xie verbatim was a separate matter to their ability to recall the substance of those conversations: [87]-[99], [106]-[123].

Contacts: duress; Corporations: fiduciary duties

Elite Realty Development Pty Ltd v Sadek **[2023] NSWCA 165**

Decision date: 19 July 2023

Payne, Mitchelmore and Stern JJA

Two appeals were heard concurrently, both arising from property developments conducted on behalf of Mr Afyouni (the second appellant) and Mr Sadek. In the Maroubra appeal, Elite and another company were incorporated for the property development. Mr Afyouni changed the access settings to Elite's bank accounts so that money could be withdrawn only if he and Mr Sadek consented. This caused problems for Elite paying its subcontractors, resulting in one subcontractor threatening Mr Afyouni with a gun and demanding that he reverse the changes to his account. Mr Afyouni complied. The primary judge found that Mr Sadek either procured or acted in common design in relation to the attack. After the attack, Mr Afyouni and Mr Sadek entered into an agreement to terminate the joint venture for the development. Relevantly, the primary judge declined to order recission of that agreement on the basis that although it was entered into under duress, he affirmed it once the duress had ended. In the Avoca appeal, Mr Afyouni and Mr Sadek were owed money by a construction company and its subsidiaries. In exchange for releasing the debt, one of the subsidiaries entered a joint venture with Elite to develop a property. When the relationship began to break down, a deed was executed settling the dispute and terminating the joint venture. The primary judge found that Elite's claim that by terminating the venture, Mr Sadek, as its director, breached his fiduciary and directors' duties failed.

Held: dismissing the appeal

- Affirmation was pleaded with sufficient clarity in the defence at first instance: [52]-[54]. Even if it was not, the appellants were on notice at first instance that the respondents relied on affirmation: [59]. The primary judge expressly raised the topic of affirmation as a bar to rescission with both parties: [56].

- The test for duress is whether the will of the party alleging duress was deflected by illegitimate pressure, causing them to enter the impugned agreement. It must also be reasonable for the person alleging duress to believe that the person engaging in the wrongful conduct would take the action foreshadowed: [20]. Affirmation may occur when the person under duress performs the voidable contract with knowledge of the circumstances after escaping from the duress and taking no steps to set aside the agreement. Mr Afyouni's post-traumatic stress disorder diagnosis did not constitute duress: [68]-[70]. Psychiatric illness is not co-extensive with duress: [66]-[67]. Mr Afyouni affirmed the termination agreement by accepting $700,000 due to him under the agreement, by resigning his directorship of MRD and transferring his shares: [70].

- At first instance, the appellants' case was that Mr Sadek terminated the Avoca Breach joint venture at law: [95]-[96], [98]. On appeal, the appellants argued that Mr Sadek's conduct falling short of legal termination amounted to a breach of duty: [99]. This was inconsistent with what was argued at first instance and was not permitted: [101].

- The primary judge did not describe loss as a "precondition" for equitable compensation or *Corporations Act 2001* (Cth) s 1317H damages: [108]-[109]. The case put by the appellants to the primary judge was that Elite should be compensated for loss. Relief would have been refused because no loss was demonstrated: [107].

Contract: construction; partly oral and partly written judgment; breach

***C&V Engineering Services Pty Ltd v Metropolitan Demolitions Pty Ltd* [2023] NSWCA 167**

Decision date: 24 July 2023

Kirk, Adamson and Stern JJA

In 2018, C&V was subcontracted to Metropolitan as a steel fabricator for a development in Circular Quay involving work on three buildings (A, B and C). C&V sued Metropolitan for alleged outstanding sums in relation to work done on buildings B and C. The primary judge found in favour of C&V and awarded damages in respect of building B, but found that C&V's claim to be paid an item described as "Administration" and the GST component on a tax invoice for a supply were not recoverable as damages. The primary judge rejected the Building C claim on the basis that there was a partly oral, partly written contract, subject to a condition which was never satisfied.

Held: allowing the appeal in part

- The partly written, partly oral contract in relation to Building C was not conditional on a direction from Metropolitan prior to commencement of fabrication: [8]. The commercial object and purpose of the contract was to enable Metropolitan to comply with its own obligations to have soldiers on site for Building C to enable excavation and construction of the building to continue without delay and for C&V to undertake tasks to enable that to happen. The construction is supported by both the commercial object and purpose and is reinforced by the post-contractual conduct: [119]. There was a contract between C&V and Metropolitan for C&V to procure materials and fabricate soldiers for Building C with the price, design details and the number of steel soldiers to be agreed at a later date: [120]. The quantum of damages for breach of contract to be awarded to C&V in respect of this contract should be remitted to the Court below: [121].
- The claim for administration charges for Building B rests upon one invoice and the Standard Terms and Conditions of C&V, in which there is no reference to administration charges. Therefore, the evidence does not suffice to establish a proper basis for C&V's claimed administration charges for work on Building B and the contention to the contrary should be rejected: [122]-[124].
- Given the agreed position of the parties, and the orders proposed jointly, the judgment sum awarded to C&V in respect of work on Building B should be increased to reflect the GST component for the supply: [125].

Equity: specific performance

Akrawe v Culjak [2023] NSWCA 171

Decision date: 27 July 2023

Bell CJ, Leeming and Mitchelmore JJA

Mr Akrawe entered into a contract with the respondents to purchase a property for $1,550,000 with a 10% deposit. The settlement date was 25 January 2021 but was extended to 22 February 2021. On 22 February 2021, completion did not occur. The parties commenced the process of rescinding the original contract and entering into a new contract to substitute the applicant with his son as the purchaser. The new contract was never completed. The respondents served a Notice to Complete and Mr Akrawe's solicitor advised that the applicant required further time to settle the purchase. In March 2021, the respondents served a Notice of Termination of the contract. The primary judge declared the contract was validly terminated and ordered that the deposit be paid by Mr Akrawe to the respondents.

Held: dismissing the appeal

- It was inherently plausible that the respondents kept open the possibility that they may agree to a course other than the completion of the original contract in accordance with their Notice to Complete: [83]. By contrast, the finding for which the applicant contended, being that the respondents would not under any circumstance agree to proceed with a new contract in the son's name, of was implausible and was not squarely put to either vendor: [84].

- There was no direct testimonial evidence that the applicant would have complied with the Notice to Complete. The applicant had also demonstrated a history of not providing funds in accordance with promises binding him. There was nothing to suggest that the mere rescheduling of a PEXA appointment is anything like a secure foundation for the inference that the applicant would have funds enabling completion to occur: [85]-[88].

- The evidence provided to support the contention that the applicant had sufficient funds was contradictory, confusing and sat uneasily with contemporaneous emails. There was no cogent evidence adduced to establish the actual amounts of cash held at the relevant time. The primary judge did not err in finding that the applicant did not have the funds necessary to complete the transfer: [97]-[98].

- As no material error of fact was made out, the Court would not re-exercise its discretion under s 55(2A) of the *Conveyancing Act 1919* (NSW). Even if relief against forfeiture were not justified, the circumstances could still justify a return of the deposit. There was no appealable error in the exercise of the primary judge's discretionary power: [103]-[107].

Australian Intermediate Appellate Decisions of Interest

Worker's Compensation; Anshun Estoppel

***River Hill Contracting Pty Ltd v Moore* [2023] WASCA 111**

Decision date: 17 July 2023

Buss P, Mitchell and Beech JJA

Mr Moore sustained two spinal fractures in the course of working for River Hill In 2017. Allianz Australia Insurance Limited, River Hill's worker's compensation insurer, accepted liability and began weekly worker's compensation payments. Once the payments ceased, a dispute arose concerning whether Mr Moore's ongoing back pain was a result of the spinal fractures or aggravation of a pre-existing degeneration of his lumbar spine, which the accident contributed to and whether the pain prevented Mr Moore form working. At arbitration, the arbitrator found that the claim arising from aggravation of degeneration could not be resolved because it as not referred to in his initial claim form in 2017 and he did not refer to s 58 of the *Workers' Compensation and Injury Management Act 1981* (WA) in his first conciliation application. Mr Moore submitted a second claim form in relation to the degeneration, leading to a second arbitration in which it was determined that the doctrine of Anshun estoppel did not preclude Mr Moore from pursuing the claim.

Held: granting leave to appeal but dismissing the appeal

- Anshun estoppel did not preclude Mr Moore from pursuing his claim regarding aggravation of degeneration in the second arbitration application because Mr Moore took reasonable steps to pursue the claim in the first arbitration application and the claim should have been determined in the first arbitration. Even if the first arbitrator was correct in finding that the claim could not be resolved, Mr Moore had taken steps to pursue the claim in the first arbitration application such that he did not act unreasonably in the Anshun sense and no Anshun estoppel would arise: [7], [76], [79]-[80, [82].
- There would have been no inconsistency between the first arbitration decision and an order for weekly payments made in the second arbitration application as the two arbitration processes concerned two different injuries: [77].
- The Act does not suggest that by failing refer to one injury in a claim form, which asked for 'the most serious injury' as opposed to all injuries to be identified, and failing to refer to s 58 of the Act in his first conciliation application, the claim in relation to that injury can never be determined on its merits: [78]-[79], [81], [83]-[84]. Referring to the incorrect section of the Act does not invalidate an application: [85]. Even if the issue of aggravation of degeneration was technically outside the scope of the dispute, the arbitrator should have considered the claim under s 189(1) of the Act. This would have enabled the substantial merits of the dispute to have been resolved with minimal formality and technicality consistent with the aims of the Act: [1], [86].

Construction: payment claim

***Civil & Civic Corporation Pty Ltd v Nova Builders Pt Ltd* [[2023] ACTCA 30]**

Decision date: 18 July 2023

Mossop and O'Sullivan JJ and Curtin AJ

Nova builders owned a site upon which it was carrying out a development. Civil & Civic was the bulk excavation contractor. There was no written contract. On 20 July 2021 Civil & Civic made a payment claim under the *Building and Construction Industry (Security of Payment) Act 2009* (ACT). Civic & Civil referred the payment claim to adjudication. The determination made in the adjudication were appealed. The primary judge had found that the adjudicator appointed pursuant to the Act had not erred in the determination by finding that the payment claim was not invalid by reason of their being prior payment claims claiming the same work. The effect of this finding was that the fact that there were prior payment claims claiming the same work but which relied on different reference dates did not contravene the prohibition in s 15(5) of the Act.

Held: dismissing the cross-appeal

- Under s 15(5) of the Act, there cannot be more than one payment claim for each reference date in the context of a contractual regime giving an entitlement to make progress claims: [38]-[41], [120]. The authorities referred to which concerned the prohibition against multiple payment claims relying on the same reference date or concerned a contract between the parties which governed the making of progress payments should be distinguished on their facts: [60], [64], [69]-[70], [71]-[72], [88].
- *Grid Projects NSW Pty Ltd v Proyalbi Organic Set Plaster Pty Ltd* [2012] NSWSC 1571 should not be applied as it was decided on the basis that it falls within s 8(2) of the NSW Act which, although similar to s 10(3)(b) of the Act, differs in the definition of reference date. If the contract fails to elect a reference date, the NSW Act allocates the last day of the named month as the reference date whereas the Act allocates the last day of the calendar month: [82], [85]. In Broadview, it was found that *Grid Projects* failed to give the expression "named month" its statutory meaning and was therefore wrong: [86].
- A new reference date for work carried out may arise at the end of each subsequent named month following the last day of the calendar month in which the construction work was first carried out if the payment claim was given, if less than 12 months have elapsed since the relevant construction work occurred: [93]-[94]. This construction is consistent with the purpose and policy of the Act, being to provide a protective mechanism for subcontractors and suppliers to ensure that they can recover progress payments to minimise the risk of insolvency in the construction industry: [108]-[109], [117], [121]-[122]. Therefore, a subsequent payment claim (with a different reference date) may include an amount that was the subject of a previous claim: [120].

Asia Pacific Decision of Interest

Constitution; Land and Titles Court

***Ropati v Attorney General* [[2023] WSCA 2]**

Decision date: 18 July 2023

Court: Court of Appeal of Samoa

Harrison, Asher and Young JJ

The primary judge refused an interlocutory application for an interim declaration. In 2021, constitutional changes came into force in relation to the Land and Titles Court, from the *Constitutional Amendment Act 2020* (Samoa) (CAA 2020) and the *Land and Titles Act 2020* (Samoa) (LTA 2020). Mr Ropati was the President to the Land and Titles Court which existed prior to the reforms but it is unclear whether Mr Ropati transitioned to the correspondent role in the Land and Titles Court which was created by the reforms. Under s 67(6) of the LTA 2020, an appointment under the previous Act that is not provided for in LTA 2020 is revoked at the commencement of the LTA 2020. In April 2022, the Supreme Court of Samoa found that Mr Ropati was to work to fill the gap until the new President was appointed. In October 2022, the Prime Minister wrote to Mr Ropati stating that he would be removed as President and the appointment of another person as President was announced.

Held: allowing the appeal in part

- Under art 75 of the *Constitution of the Independent State of Samoa*, the Court of Appeal has the jurisdiction to hear appeals from interlocutory decisions of the Supreme Court. Article 75 is similar to the s 66 of the *Judicature Act 1908* (NZ) in which "any judgment, decree, or order" has been construed to allow appeals from interlocutory decisions: [45]-[48].
- Mr Ropati has an arguable case: [59]. He was not appointed under s 104D of the *Constitution* so his entitlement to the protection of that section is premised on the effect of the CAA and LTA 2020 being that he became the President of the new Land and Titles Court: [53]. Prior to the CCA and LTA 2020, the appellant's tenure was guaranteed by s 26D of the LTA 1981, in a way that borrowed from the *Constitution*: [54]. It is not unconstitutional if the legislation, on its true interpretation, removed the appellant from office: [55]. It is possible to construe s 66 of the LTA 2020 so as to provide that the appellant became President of the new Land and Titles Court, by considering: the operation of s 66(3) and s 67(4), the similarities between the roles of the President and Samoan judges in the old and new Land and Titles Court, the failure to provide for new appointments of judges, and considerations of judicial independence: [57].
- Although res judicata considerations in relation to the April 2022 judgment may preclude a claim by Mr Ropati to be President of the new Land and Titles Court, it may be found that he has rights under the April 2022 judgment that may have been breached: [51], [61].

International Decision of Interest

Human Rights; Standard of Proof

***Jones v Birmingham City Council and another* [2023] UKSC 27**

Decision date: 19 July 2023

Lord Hodge, President, Lord Hodge, Deputy President, Lord Lloyd-Jones, Lord Sales, Lord Stephens, Lady Rose, Lord Richards

In order to address prevalent gang-related violence In Birmingham, the Birmingham City Council applied to Birmingham County Court for injunctions, under s 34 of the *Policing and Crime Act 2009* (UK) or alternatively part 1 of the *Anti-Social Behaviour, Crime and Policing Act 2014* (UK), to prevent the defendants from engaging in gang-related violence and drug dealing activity. The injunctions were granted in 2016. Mr Jones sought a declaration from the High Court that the injunction claim was incompatible with art 6 of the *European Convention of Human Rights* ("ECHR"), which he claims require such allegations to be proven to the criminal standard. The High Court and the Court of Appeal found against Mr Jones on the basis that the proceedings were civil in nature and the balance of probabilities standard of proof was not incompatible with art 6 of the ECHR.

Held: dismissing the appeal

- Article 6(1) of the ECHR, as given effect by the *Human Rights Act 1998* (UK), does not require the criminal standard of proof to be satisfied to prove such allegations within s 34(2) of the 2009 Act or s 1(1) of the 2014 Act. Article 6(1) does not prescribe any rules for the burden or standard of proof as these are matters for domestic law and there is no indication that that position is likely to change: [36], [38]. *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787 does not propose that anti-social behaviour under s 1(1)(a) of the *Crime and Disorder Act 1998* (UK) must be proved to the criminal standard. The standard of proof under the 1998 act was the balance of probabilities and if any of the reasoning in *McCann* suggests otherwise, it is wrong: [56].
- Parliament has expressly provided that the standard of proof applicable in relation the granting of such injunctions under the 2009 and 2014 Acts shall be the civil standard. Therefore, there is no room for the courts to decide that the criminal standard applies: [58]. The civil standard was chosen to address the seriousness of gang violence: [61]-[63].
- Part 4 of the 2009 Act and Pt 1 of the 2014 Act conform with the requirements of a fair hearing under art 6 of the ECHR. There is no authority for the proposition that a fair hearing under art 6(1) requires the criminal standard of proof: [37]-[38]. Parliament, while selecting the civil standard of proof, has also incorporated procedural safeguards into the 2009 and the 2014 Acts to secure the fairness of any trial in relation to gang injunctions: [64]-[65].