Court of Appeal
Supreme Court
Sydney

Decisions of Interest

31 July 2023 – 13 August 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: misleading and deceptive conduct

***Lin v Zheng* [2023] NSWCA 174**

Decision date: 1 August 2023

Bell CJ, Payne and White JJA

The respondents and the third plaintiff below (together, the Lenders), advanced funds on an unsecured basis to Quantum Investments (Aust) Pty Ltd for the purchase and development of an apartment building. Mr Lin was the director of Quantum. Quantum on-lent the funds on an unsecured basis to another company. That company did not repay Quantum in full, and Quantum did not repay the Lenders in full. The Lenders sued Mr Lin, alleging six misleading or deceptive representations: that Mr Lin personally guaranteed the repayment of the monies (the Guarantee Representation); that the monies would be repaid regardless of the development's outcome (the Guaranteed Repayment Representations); that monies loaned to Quantum would be secured against the development land (the Security Representation); that there was no risk or low risk in providing the loans (the No Risk and the Low Risk Representations). The primary judge held that the Guarantee Representation was established in relation to three of the Lenders, that the two Guaranteed Repayment Representations were established in relation to all but one of the Lenders and the representations were a cause of the respondents' loss.

Held: granting leave to appeal but dismissing the appeal

- For the purposes of s 4 of the *Australian Consumer Law*, a statement of what the representor believes a future position will be may be a representation with respect to a future matter depending on the words used and the context. There will not be reasonable grounds for making a representation if, at the time of making it, the representor did not have facts sufficient to induce in the mind of a reasonable person, a basis for making the representation: [31]-[36]. The Guaranteed Repayment Representations conveyed an assurance of repayment in the event of the development's failure, and were representations as to a future matter which were misleading or deceptive: [37]-[44]; [61]-[67].

- If a material representation is made which is calculated to induce a person to enter into a contract and that person does so, an inference arises that the representation induced them to enter into the contract. To establish reliance on such a representation, a causal connection between the alleged representations and the loss for which they seek compensation must be established: [49]-[53]. The nature of the Guaranteed Repayment Representations did not preclude a finding of actual reliance: [54]-[57]; [68]-[69]; [82]-[83]; [91]-[92].

- It is necessary to look at the actual conduct of proceedings to see whether a point was taken at trial: [63]-[64]. Regarding adequacy of reasons, the function of an appellate court is to determine the minimum acceptable standard: [72]-[73].

Torts: malicious prosecution

***State of New South Wales v Spedding* [2023] NSWCA 180**

Decision date: 9 August 2023

Bell CJ, Ward P, Adamson JA

A three-year-old boy, William Tyrrell, disappeared in 2014. Mr Spedding was a suspect in the disappearance. In 2015, Jubelin was the Supervising Officer of the Tyrrell Investigation and worked with Moynihan and Brennan. One strategy utilised as part of the Investigation was arresting and charging Mr Spedding with various unrelated counts of alleged child sexual assault said to have occurred in 1987 and to ensure that Mr Spedding was refused bail so that a covert listening device could be placed in his cell. Mr Spedding was arrested and charged with the offences and was found not guilty on 5 March 2018. Mr Spedding was awarded costs in relation to his prosecution. Mr Spedding commenced proceedings for malicious prosecution, misfeasance in public office and collateral abuse of process. The primary judge found in favour of Mr Spedding and found the State vicariously liable for Jubelin, Moynihan and Brennan (together, the Police Officers) and the Office of the Director of Public Prosecutions (ODPP) (which was held liable for malicious prosecution).

Held: dismissing the appeal

- Whether a relevant prosecutor lacked reasonable and probable cause depends on what material was available to a prosecutor, and what the prosecutor "made" or "should have made" of that available material: [227]-[228]. The Police Officers lacked a reasonable and probable basis for arresting and charging Mr Spedding as they had evidence which did not support the allegations and had not taken key investigative steps: [236]-[238]. The Police Officers effectively controlled and maintained the proceedings even after the ODPP had taken carriage of the proceeding by withholding material: [247]-[248], [250]-[251].

- It was accepted that the arrest of Mr Spedding in order to advance an unrelated criminal investigation was an improper purpose. Malice can be inferred from the improper purpose that existed when proceedings were commenced: [254]-[255], [267]. However, the Police Officers' purpose in arresting and charging Mr Spedding, from which the primary judge inferred malice on their part, was never disclosed to the ODPP: [257].

- While there is some force in the submission that the maintenance of proceedings for the purpose of the tort of malicious prosecution does not necessarily involve the exercise of public power by the police for the purposes of the separate tort of misfeasance in public office, the institution of the proceedings was an unauthorised act for the purpose of the tort. The State at least implicitly accepted that the arrest and charging of Mr Spedding could and would be an unauthorised exercise of public power if undertaken for an improper purpose. Therefore, no challenge to the finding of liability for this tort could succeed: [264]-[266].

- Nothing turns on whether Jubelin was a party to the criminal proceedings, as the State was vicariously liable for Moynihan and Brennan who were. It was open to the Court to infer that, as Jubelin's direct reports, they shared his improper and dominant purpose in commencing the criminal proceedings: [271], [274]-[276]. The 'maintenance' of the proceedings was not relevant in determining that the proceedings had been commenced for a dominant purpose which was outside the scope of the criminal process invoked: [277]-[278].

- *House v The King* error must be demonstrated in relation to the assessment of non-economic loss: [299]. The components of the damages which are intended to have a compensatory effect were not excessive: [311]-[312]. Exemplary damages are particularly significant where public officials have been involved in committing the tort: [315], [318].

Equity: trusts; mutual wills; Real Property: caveats

Thynne v Sheringham **[2023] NSWCA 181**

Decision date: 9 August 2023

Ward ACJ, Kirk JA and Basten AJA

Mr Thynne's father died in 2011 leaving most of his assets, including a property in Darling Point (the Property), to his second wife, Ms Sheringham. Before he died, the testator and Ms Sheringham agreed that Ms Sheringham would leave the Property or its proceeds of sale, to the extent that they remained at her death, to Mr Tynne and his half-brother in equal shares. This arrangement was recorded in a Memorandum of Wishes. Mr Tynne lodged a caveat on the title of the property on the basis that this arrangement gave rise to a constructive trust. The primary judge made orders that the caveat be withdrawn.

Held: granting leave to appeal and dismissing the appeal

- The ultimate beneficiaries under the agreement have an equitable interest in the property prior to the survivor's death, which constrains the absolute ownership otherwise vested in the survivor when the testator dies: [9]-[10], [66]. The "floating obligation" referred to by Dixon J in *Birmingham v Renfrew* (1937) 57 CLR 666; [1937] HCA 52 is a characterisation of the obligations imposed on the survivor through the "trust" which arises from the moment the first testator has irrevocably performed his part in the agreement. The ultimate beneficiary acquires personal rights against the survivor to ensure that the survivor complies with his or her obligations under the agreement: [11]. The ultimate beneficiaries may thus have an equitable right to complain about particular transactions which diverge from the survivor's obligations under the agreement, but not a proprietary interest sufficient to support a caveatable interest in the Property; the primary judge did not err in so concluding: [15], [66].
- The statement in *Birmingham v Renfrew*, that the equitable obligation only crystallises as a trust at the date of the survivor's death, did not support Mr Thynne's contention, that he was, from his father's death, a beneficiary under an existing trust, imposed to give effect to the constraints on the survivor's right to dispose of the Property: [36]. The fact that the obligation in the agreement arises at the wife's death, and the provision for her to use the proceeds of sale or rent of the Property for her own maintenance suggested that the testator recognised that the Property's value might be exhausted before her death: [57]. Mr Thynne's contention that the caveat supports a reasonably arguable claim of breach of the wife's contractual obligations turned on propositions that the power of sale does not extend to a power to use the Property as security for a loan, and the uses of the proceeds of sale permitted by the agreement do not extend to investment in a farming business: [60]. A right to dispose of the property by sale must include a right to a lesser disposition than selling. The contention that the testator intended that the land, as opposed to the farming business, was to be operated on a profitable basis, was almost incoherent: [63]-[65].

Judicial Review; Environment and Planning

***McMillan v Taylor* [2023] NSWCA 183**

Decision date: 9 August 2023

Payne and Kirk JJA and Basten AJA

The respondents (the owners) in this proceeding are the owners of a property who sought development approval to demolish an existing dwelling and to erect a new dwelling with one storey at the front and three stories at the rear, a swimming pool and a sauna. Development consent was refused by the Woollahra Municipal Council (the Council) and the owners appealed to the Land and Environment Court. The Owners and the Council reached an agreement and the Court gave effect to the agreement by an order granting consent to the proposal. Five neighbours, who had lodged objections to the proposed development during the Land and Environment Court proceedings, sought judicial review of the order.

Held: dismissing the appeal

- Section 34AA(3) of the *Land and Environment Court Act 1979* (NSW) (the Court Act) conferred power on the Commissioner to terminate the conciliation conference, thus qualifying the mandatory nature of the process, but imposed no duty to terminate or consider terminating the conference. It was not necessary to explore the circumstances in which the power to terminate under s 34AA(3) should be exercised. There would need to be unusual circumstances which would require the Commissioner to terminate without a request from a party: [29]–[31]. The Commissioner was aware that the applicants had written to the Council seeking termination, in which circumstance it should not be inferred that the Commissioner did not consider the possibility of termination: [32].

- Reference to "legitimate expectations", as an element of procedural fairness, should be eschewed: [35]. Procedural fairness requires that a person who may be adversely affected by a decision should have an opportunity to be heard. The content of the obligation depends on the statutory context: [37]–[39]. Procedural fairness is an obligation owed by the court to the parties, as is the obligation to consider material before the court. The constraint under s 34(3) of the Court Act that the agreed decision must be "one that the Court could have made in the proper exercise of its functions" requires consideration of any jurisdictional constraints on the Court's power to make the order. It reflects the general law principle that parties cannot confer jurisdiction on a court or tribunal by consent. A Commissioner presiding over a conciliation process is not required to make an independent determination on the merits: [4]-[6]; [62]-[65]; [67]-[80].

- Although the Commissioner did not refer to an amendment made to cl 6.2 of the Woollahra Local Environmental Plan 2014, it merely introduced matters for evaluative consideration by a consent authority, and not a jurisdictional constraint. The Commissioner referred to the substantive issues of structural integrity and groundwater: [85].

Australian Intermediate Appellate Decisions of Interest

Human Rights; Constitution; Inconsistency of Laws

***Athwal v State of Queensland* [2023] QCA 156**

Decision date: 1 August 2023

Mullins P, Dalton JA and Mitchell AJA

Section 51(1) of the *Weapons Act 1990* (Qld) creates the offence of physically possessing a knife in a public place or school without a reasonable excuse. Section 51 contains provisions which are evidently directed at Sikhs, many of whom hold religious beliefs that require them to carry a ceremonial knife, called a kirpan. Section 51(4) in effect provides that it is a reasonable excuse to physically possess a knife in a public place for genuine religious purposes, but s 51(5) provides that it is not a reasonable excuse to physically possess a knife in a school for genuine religious purposes. The appellant sought a declaration that s 51(5) of the *Weapons Act* is inconsistent with s 10 of the *Racial Discrimination Act 1975* (Cth) (RDA) and is invalid under s 109 of the *Constitution* on the basis that s 51(5) operates in a discriminatory manner to prevent Sikhs from entering a school while adhering to their religious beliefs. The primary judge dismissed the application.

Held: allowing the appeal

- The primary judge erred in characterising the relevant rights as the right to religious freedom, or the right to freedom of movement, while wearing a knife as an article of faith in a school because: the rights with which s 10(1) is concerned are broad rights in the "political, economic, social, cultural or any other field of public life; and it was incorrect to incorporate into the definition of the relevant right the attribute fastened onto by the impugned legislative provision: [5]-[12], [117]-[120].

- Facial neutrality will not necessarily prevent a law from falling within the ambit of s 10(1): [32]-[33]. To engage s 10 of the RDA, it is not necessary to show that all persons of a particular race, colour or national or ethnic origin enjoy the relevant right to a more limited extent than others. Nor is it necessary to show that only persons of the particular race, colour or national or ethnic origin enjoy the relevant right to a more limited extent than others: [57]-[59]. The practical operation and effect of the law is relevant in determining whether the legislation has a discriminatory purpose or effect that engages s 10 of the RDA: [60]-[62].

- The reference to a "knife" in s 51 includes a kirpan even if it is blunt because: the definition in s 51(7) is inclusive; it is unlikely that Parliament would have intended the commission of an offence against s 51(1) to depend on the degree of sharpness of the said knife; and s 51(4) specifically refers to a "knife known as a kirpan": [96]-[99]. There is nothing to suggest that a knife sewn into a pouch ceases to be a knife for the purposes of s 51: [100]-[102], [107].

- Section 10 of the RDA will not be engaged when a general law prohibits certain conduct by all members of the community, even where that conduct may be the subject of religious beliefs only by persons of a particular ethnic origin: [109]-[110]. However, s 51(5) specifically targets Sikhs and no other ethnic group and significantly affects their exercise of freedom of movement and freedom of religion: [103]-[107], [111]-[115].

Taxation: luxury car tax; GST

***Automotive Invest Pty Limited v Commissioner of Taxation* [2023] FCAFC 129**

Decision date: 11 August 2023

Logan, Wheelahan and Hespe JJ

The appellant traded under the name "Gosford Classic Car Museum". The business involved acquiring rare, unusual or "classic" motor vehicles, displaying them in a museum-like format, charging an entry fee, and selling the cars that are on display. An issue arose as to whether the appellant has an increasing adjustment on the basis that once the vehicles were placed in the Gosford premises, the appellant started to "use the cars for a purpose other than a "quotable purpose" under s 15-30(3) and s 15-35(3) of the *A New Tax System (Luxury Car Tax) Act 1999* (Cth) (LCT Act). A further issue arose as to whether when the appellant imported or acquired the vehicles, it had the intention of using that vehicle for the purpose of holding it as trading stock "and for no other purpose" for the purposes of s 9-5(1) of the LCT Act. The primary judge found that the appellant used the motor vehicles as both trading stock and for another purpose, being as exhibits in a museum.

Held: dismissing the appeal

- In s 9-5 of the LCT Act, "for no other purpose" is to be read as requiring that the quotable purpose be the sole or only purpose, rather than as requiring the other purpose to be exclusive or alternative to the quotable purpose: [93]. As is evident in the explanatory memorandum, the phrase "other than … for hire or lease", which qualifies the concept of trading stick, does not require the phrase "and for no other purpose" to be read otherwise than as "solely": [94]. Section 9-5(1) does not distinguish between a dominant and a subsidiary purpose: [96].
- The LCT Act does not define a "retail" sale. The LCT Act permits a deferral of tax in the circumstances in s 9-5(1)(a). There is no basis for importing into that provision the idea of taxing only a "retail" sale when that is not a concept imported into the legislation: [95].
- The relevant question is whether the use of the cars as part of a display was an incident of holding the car as trading stock, such that its display was part of its use as trading stock and part of a singular purpose: [99]-[101]. The purpose for which the cars were used, when considering the provision of facilities, the charging of a more than nominal entrance fee, the engagement of employees to provide tours, and the marketing of the exhibit as a tourist destination is not consistent with a conclusion that the cars were being used for the sole purpose of being held as trading stock: [102]-[106], [108]-[110].
- In dissent, Logan J found that the primary judge erred in focussing on aspects of marketing, staffing and the display in isolation, and failed to discriminate between an overarching end and incidental means: [46], [51], [54]. An incidental purpose does not render a use other than an exempt use even where that exemption is conditioned upon the exempt use being "wholly or mainly": [44].

Asia Pacific Decision of Interest

Copyright: exclusive rights

ESR Group (NZ) Limited v Burden **[2023] NZCA 335**

Decision date: 31 July 2023

Miller, Brown and Katz JJ

ESR imported furniture from Vietnam to New Zealand for the purpose of selling it. In 2016, the High Court found that the imported furniture constituted infringing copies of Mr Burden's artistic works and found ESR liable for secondary infringement under s 35 of the *Copyright Act 1994* (NZ) (the Act). The Court of Appeal subsequently found that the second and third respondents, but not Mr Burden, were the relevant owners of the copyright works and that ESR was liable for secondary infringement but lacked the requisite knowledge of infringement of copyright in respect of the importation of goods. After learning of further importations, the first, second and third respondents amended their claim to allege other instances of secondary infringement and a claim of primary infringement of s 31.

Held: allowing the appeal

- Importation of a copy, whether genuine or infringing, cannot by itself constitute the restricted act of issuing a copy to the public. Some additional step that distributes the copy to the public is necessary for liability to arise under s 31: [55]. Section 31 does not incorporate a defence to infringement of the distribution right if the distributor is unaware that the copy they are selling has never previously been distributed: [60].

- It is not the case that a copyright work will only be put into circulation under s 9(1) if the relevant act is performed either by, or with the consent of, the copyright owner. The release of a copy to the market, whether unauthorised or non-infringing, causes the copy to be placed "in circulation". The copyright owner's exclusive right to distribute that copy is then spent, notwithstanding that the act of issuing was an infringement of the owner's s 16(1)(b) right: [103].

- The circulation outside of New Zealand of a copy of a work may qualify as circulation for the purposes of s 9(1): [127]. Reading s 9 such that it includes circulation abroad would not give the Act an extraterritorial effect because it would be no different from other provisions in the Act that refer to acts done in New Zealand or any other country": [108].

- The act of exporting product from a country to New Zealand could not of itself amount to issuing the product to the public in New Zealand. Rather, the product would need to be received in New Zealand and then made available for distribution to the public there. The staged process of export, import and subsequent distribution cannot be conflated into a single course of conduct that confers on the exporter the identity of issuer: [133].

International Decision of Interest

Bankruptcy; Standing

Brake and another v The Chedington Court Estate Ltd **[2023] UKSC 29**

Decision date: 10 August 2023

Lord Briggs, Lord Hamblen, Lord Leggatt, Lady Rose and Lord Richards

Mr and Mrs Brakes were made bankrupt in 2015. In the course of disposing of the bankrupt estate, the trustee in bankruptcy sought to sell a cottage (the Cottage). Both Chedington and the Brakes entered bids to purchase the Cottage. The liquidators accepted Chedington's higher bid. Dr Guy and Chedington agreed to an arrangement with the Trustee to purchase the Cottage (the "Facilitation Agreement"). The Brakes sought to challenge these transactions under s 303(1) of the *Insolvency Act 1986* (UK) (IA), both in their personal capacities as bankrupts and in their capacities as trustees of the Brake Trust, which provides for the trustee's decisions to be challenged on the application of "dissatisfied" persons. The Court of Appeal held that the Brakes had standing in their personal capacities.

Held: allowing the appeal

- Under s 303(1), or s 168(5), of the IA creditors have standing where their application concerns their interests as creditor; the bankrupt or contributories have standing if there is or there is likely to be a surplus; and, in a limited class of cases, creditors, bankrupts, contributories or others will have standing in respect of matters directly affecting their rights or interests and arising from powers conferred on trustees or liquidators which are peculiar to the statutory bankruptcy regime. The Brakes did not fall within any of these categories and do not have standing under s 303(1) of the IA: [99]-[100].

- In their personal capacities, the Brakes did not have any legitimate and substantial interest in the relief sought because their possessory rights to the Cottage were unconnected to their position as bankrupts: [80].

- It was not accepted that all that is required for the purposes of standing is that a trustee should have wrongfully interfered with an existing right of the applicant because this would allow any person whose rights were wrongfully interfered with by a trustee, who was acting as a trustee, to apply for relief under s 303(1): [81]-[82]. "Wrongfully" means "unlawfully" in two senses, referring to: conduct which is directly actionable by the complainant in any event, and if the rights of the complainant were interfered with by the trustee acting beyond the trustee's statutory powers or in breach of duty as trustee: [84], [86]. It is contrary to principle for a person to whom a duty is not owed to be able to seek relief for a breach of that duty: [87]. The enactment of s 304 of the IA demonstrates that it was not the legislative intention to enable such relief to be sought by third parties uniquely against trustees in bankruptcy under s 303(1): [88].