Decisions of Interest

9 October 2023 – 22 October 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

Courts and Judges: inherent jurisdiction; Legal Practitioners

Beau Timothy John Hartnett trading as Hartnett Lawyers v Anthony Robert Bell as Executor of the Estate of the late Mabel Dawn Deakin-Bell **[2023] NSWCA 244**

Decision date: 12 October 2023

Bell CJ, Adamson JA and Griffiths AJA

Mr Hartnett acted for Gwendoline in enforcing a mortgage against Mabel. An unsigned copy of a costs agreement gave a costs estimate of $3,900 to $6,400 and purported to be issued "pursuant to the … Legal Profession Act 2007". At the conclusion of these proceedings, Mr Hartnett had prepared invoices amounting to $77,200. In 2016, Mr Hartnett provided two estimates of costs to the NSW Trustee and Guardian, being "in the range of $220,000.00-$240,000.00" and "in the range of $302,500.00-$330,000.00." When the property was sold for $376,000, Gwendoline authorised payment to her of $39,089.57, to Hartnett Lawyers of $288,601.03, and of the balance ($33,834.45) to the Supreme Court of New South Wales (the last payment was not made). After obtaining probate of Mabel's will, her executor Mr Bell sought unsuccessfully to obtain copies of invoices and amounts charged by Mr Hartnett and made various related complaints to the Legal Services Commissioner of Queensland. In 2018, Mr Bell sought an assessment of the work Mr Hartnett performed in Gwendoline's proceedings against Mabel. Costs were assessed at $37,345.50 (the Wall Assessment). Gwendoline died in May 2018. Mr Bell commenced proceedings (the Equity Proceedings) seeking, relevantly, a declaration that Mr Hartnett held the amount of $287,551.30 on trust for him and an order that Mr Hartnett pay him that amount. The primary judge ordered, pursuant to the Court's inherent jurisdiction, that Mr Hartnett pay to Mr Bell the difference between the amount Mr Hartnett had been paid and the Wall Assessment.

Held: dismissing the appeal

- The Court's inherent jurisdiction was not displaced by rules of Court, or the fact that a third-party payer costs assessment may have been available to Mr Bell under the *Legal Profession Act 2007* (Queensland): [130], [181]. The primary judge's discretion to make a costs order against Mr Hartnett did not miscarry. The highest standards of integrity are expected of members of the legal profession and exorbitant charging debases the reputation of the legal profession and subjects clients or others involved in litigation to unwarranted costs: [131]-[136]. Mr Hartnett was not denied procedural fairness. The supervisory jurisdiction had been squarely raised in the Equity Proceedings. Mr Hartnett had acknowledged the existence of the inherent jurisdiction and that, as an officer of the Court, he was subject to it. Mr Hartnett's application to remove both sets of proceedings to the Court of Appeal on the basis that they involved the exercise of the Court's supervisory jurisdiction was also inconsistent with his claim to have been denied procedural fairness: [145], [170]-[174].

- The primary judge did not simply accept the Wall Assessment, but rather gave a good deal of scrutiny to underlying invoices: [151]. The primary judge made use of the material she had in circumstances where the one party with personal knowledge and the ability to explain the charges did not go into evidence: [153]-[154]. It was open to the primary judge to conclude that the Wall Assessment was conducted on an indemnity basis, and her Honour's assessment was logical, fair and reasonable in all of the circumstances of the case: [157]-[158].

Commercial Arbitration

Lieschke v Lieschke **[2023] NSWCA 241**

Decision date: 13 October 2023

Leeming, Payne and Beech-Jones JJA

In 2007, the first respondent, Errol, entered into a partnership agreement with the applicants, being his son Malcolm and Malcolm's wife. In 2017, Errol gave notice of his intention to dissolve the partnership. In 2019, Errol referred a dispute about the partners' entitlements on dissolution to arbitration. The parties retained their own accountants. Errol filed points of claim under s 23(1) of the *Commercial Arbitration Act 2010* (NSW) which sought findings that various properties registered in Malcolm's name were partnership assets as well as certain variations to the partnership accounts. The arbitrator found that the relevant properties were owned beneficially by Malcolm. Errol retained new solicitors who retained another accountant for the remaining accounting issues. The arbitrator directed that only the existing accountants could confer. The arbitrator issued the Final Award. The primary judge found that Errol was unable to present his case (s 34(2)(a)(ii)) and the Final Award was in conflict with public policy (s 34(2)(b)(ii)) in that Errol was unreasonably denied the opportunity to advance a new "case" based on the new accountant's conclusions. The Final Award was set aside. Malcolm appealed.

Held: allowing the appeal

- The "public policy" inquiry posited by s 34(2)(b)(ii) is one that involves a consideration of whether there has been a "real practical injustice". A party's entitlement to a reasonable opportunity to present their case does not protect them from their own "strategic choices": [22]–[24], [105], [107].

- Subject to contrary agreement or direction, the documents under s 23(1) are significant to any identification of the "case" the parties wish to bring. The relative width of s 23(3) tells against the suggestion that a party's case is wider or fundamentally different to the documents filed under s 23(1). A reasonable opportunity to put a case includes a reasonable opportunity to seek to invoke s 23(3) to amend or supplement a party's case. However, it is difficult to accept that a party can be denied a reasonable opportunity to put a case available to them when they neither advert to that case in the documents filed under s 23(1) nor seek to amend under s 23(3): [94]–[95].

- Errol's statement under s 23(1) and the parties' written submissions identified each party's "case" and the issues in dispute. Errol's case took as its premise the correctness of the partnership accounts and was fundamentally inconsistent with the approach asserted in the new accountant's report. Errol had the material available to make an application to amend his statement under s 23(1) but chose not to. The reasonable opportunity conferred by s 18 to present his case did not enable him to introduce the new accountant's report via an accounting conclave directed to resolving the issues in dispute, which were defined according to the statements filed under s 23(1): [105].

Equity; Corporations; Succession

Soulos v Pagones; Soulos v Soulos; Soulos v Soulos; Soulos v Pagones; Kristallis v Soulos; Kristallis v Soulos; Kristallis v Pagones **[2023] NSWCA 243**

Decision date: 13 October 2023

Ward P, Meagher and Mitchelmore JJA

Seven sets of appeal proceedings were heard together, arising out of disputes between the four adult children of the late Irene Soulos (the deceased), being James Soulos, Dennis Soulos, Maria Pagones, and Nick Soulos. Also parties to the proceedings were Nick's son, John Soulos, and the executors of the deceased's estate (the deceased's accountant, solicitor and Nick). The disputes involved three family provision applications brought under s 59 of the *Succession Act 2006* (NSW) by James, Dennis and Maria ; an oppression suit brought by Maria against Nick, John, and the executors; and a proprietary estoppel claim brought by Dennis against the executors.

Held: allowing the Oppression Appeal in part and otherwise dismissing the appeals

- The acquisition by Nick and John of a 20% personal interest in the Symond Arcade (and the partnership between them and Esperia Court) amounted to oppressive conduct; and the oppression was continuing: [211], [226]. Nick and John had breached directors' duties in relation to the acquisition of the Symond Arcade and the ongoing partnership: [251], [690]. However, the grant of the lease to Nick's corporate vehicle, SPH, without a demolition clause did not amount to oppressive conduct, in circumstances where the lease was an option lease which the company was bound to grant on the valid exercise of the option: [211]. Consequently there was no breach of directors' duties by Nick and John in relation to the grant of the lease to SPH: [254]; [691]. In respect of the relief granted, the primary judge went beyond what was necessary to bring an end to the oppression in making the orders amending the constitution of the company and re-structuring Esperia Court's shareholding, as the remaining orders (which dealt with the acquisition of the Symond Arcade and the related partnership) were sufficient to put an end to the continuing effects of the oppressive conduct: [304], [692].

- Dennis' proprietary estoppel claim should have succeeded: [408], [416], [424]. The countervailing benefits that accrued to Dennis were not sufficient to displace the detriment suffered, nor was the relief granted by the primary judge out of all proportion to the equity that arose in his favour: [392], [395], [407], [693].

- The primary judge's determination that further provision was necessary for the proper maintenance and advancement of the siblings was not manifestly unreasonable, particularly given the expectations engendered by the deceased in her children: [686]. The siblings were encouraged to hold expectations of material benefit: [686]. Proper provision for James included the transfer to him of an additional 1000 "B" class shares; and those additional shares should be taken out of Nick's bequest under the Will: [686]; [695].

Administrative Law; Statutory Construction

***Granville Hotel Operations Pty Ltd v Independent Liquor and Gaming Authority* [2023] NSWCA 248**

Decision date: 20 October 2023

Bell CJ, Kirk JA and Griffiths AJA

The Hotel operates the Royal Granville Hotel, a business which operates gaming machines. Section 39 of the *Gaming Machines Act 2001* (NSW) (GM Act) imposes a mandatory shutdown of gaming machines between 4am to 10am each day. Under s 40, the Authority may approve a shorter weekend and public holiday shutdown period of 6am to 9am for any particular venue if it has taken certain Guidelines into consideration. Clause 1.2 of the Guidelines states that "approval may be given if the Authority is satisfied that … [t]he venue falls within an area where other hospitality and entertainment venues are open to 6am on Saturdays or Sundays or public holidays". The Hotel applied for such approval. For the purposes of cl 1.2 there was one other relevant venue in the area in question. The Authority took the view that the word "venues" in cl 1.2 did not include a singular venue and refused the application. The Hotel sought judicial review of that decision. The primary judge dismissed that application.

Held: granting leave to appeal but dismissing the appeal

- Section 5(1) of the *Interpretation Act 1987* (NSW) and the definition of "instrument" indicates that the *Interpretation Act* applies to documents beyond primary and delegated legislation: [32]. Assuming that the *Interpretation Act* is capable of applying to the Guideline as a relevant "instrument", it is then necessary to consider s 5(2), which provides that the Act applies except insofar as the contrary intention appears. The character of a document may make it less likely that a presumptive construction set out in the Act should be taken to be applicable: [34]. Given the nature of the Guideline at issue here, no assumption could be made that either the *Interpretation Act* or broader principles of statutory construction were part of the context which the drafter had in mind: [38]-[39]. Where it is apparent that a non-legislative legal instrument is a practical document not drafted by parliamentary counsel, less may be required to manifest a contrary intention than might be required in other contexts: [40].

- The language in cl 1.2 is plural and there is no reason to construe it as also encompassing the singular. Clause 1.2 could have been drafted so as to include the singular: [43]-[44]. Clause 1.2 identifies a category relating to the area in which the venue is located. Clause 1.1 addresses a situation where the venue is in an area of another (potentially overlapping) character. Where the provisions are seeking to identify the character of an area, it seems more likely that identifying that character would involve referring to more than one other venue: [45]-[46]. Text and context support the conclusion that the presence of only one venue of the requisite kind in the relevant area was insufficient for the purposes of cl 1.2. These considerations are sufficient to indicate an intention contrary to the provision made in s 8(c) of the *Interpretation Act*: [60].

Australian Intermediate Appellate Decisions of Interest

Damages: tort; personal injury

Norsgaard v Aldi Stores (A Limited Partnership) [2023] QCA 204

Decision date: 20 October 2023

Mullins P, Livesey AJA and Callaghan J

Ms Norsgaard was employed by Aldi. In the course of that employment, she was unpacking trays of canned tomatoes and suffered a musculoligamentous injury to her lumbar spine. Ms Norsgaard was successful in establishing liability and was awarded $157.767.71 in damages. Ms Norsgaard appealed the assessments of: $58,974.93 of past economic loss, interest and superannuation on past economic loss, and $60,000 for loss of future earning capacity and the associated superannuation. Aldi cross-appealed on the injury scale value ("ISV") of 8 and the damages assessment.

Held: dismissing the appeal and cross-appeal

- The primary judge did not err in selecting a discount of 30%in respect of past economic losses: [23]-[24]. The discount is attributable to Ms Norsgaard's limited and sporadic work history, limited qualifications and skills, unrelated breaks in part time employment and age: [18].
- The primary judge did not err in the assessment of loss of future earning capacity. The appellant and respondent's challenges to the assessment were largely concerned with the weight given to facts that were undisputed in the appeal. Therefore, the appellant and the respondent failed to show that the assessment was neither within a proper exercise of the discretion to assess the loss of future earning capacity, nor was it manifestly inadequate or manifestly excessive: [32]-[33].
- The respondent's challenge of the trial judge's award of an ISV of 8 on the basis that it was manifestly excessive failed as the factual findings on which that award was based were not challenged: [38]-[39].

Civil Procedure; Costs

Anderson v Pickles Auctions Pty Ltd **[2023] QCA 205**

Decision date: 20 October 2023

Mullins P, Flanagan JA and Henry JA

Mr Anderson sustained a work-related injury and commenced proceedings against WorkCover. The matter was settled after pre-court procedures but before trial. The terms of the compromise were recorded in a "Release and Discharge". Clause 2.1 provided: "WorkCover … will pay the Plaintiff's costs of and incidental to the claim and proceedings calculated in accordance with Part 8, Division 2 of the *Workers' Compensation and Rehabilitation Regulation 2014* (Qld), as agreed by the parties or, failing agreement, as assessed." Following a costs assessment, the assessor disallowed the recovery of counsel's fees on the basis that Part 8 Div 2 of the Regulation overrode the Uniform Civil Procedure Rules 1999 (Qld). The primary judge upheld the assessment on the basis that reg 137 of the Regulation constituted an exhaustive list of recoverable outlays.

Held: allowing the appeal

- Counsel's fees are an outlay which would be recoverable in the ordinary course under the UCPR. There is no indication that the legislature intended to fundamentally alter the scheme for the assessment and award of costs by removing the plaintiff's entitlement to recover counsel's fees: [29].
- As Chapter 17A of the UCPR contains specific rules dealing with the recoverability of counsel's fees, it is irrelevant for the purposes of reg 136(2) that the scale of costs for the present proceedings, Schedule 1 of the UCPR, does not provide for the payment of counsel's fees: [30]. It is also irrelevant that reg 132(2)(a) makes specific reference to counsel's fees: [31].
- The list of outlays in reg 137 should not be construed as constituting an exhaustive list of recoverable outlays because some fees which are not specified in reg 137 are clearly recoverable. Rather, reg 137 identifies and limits what may be recovered in relation to specific outlays which are generally particular to the proceedings to which the Act relates: [32], [34].
- The term "legal costs" in reg 137 has a broader application than the term "legal professional costs" in regs 135 and 136. Furthermore, the reference to "legal costs" in s 290A(3) includes counsel's fees: [35]. If "legal costs" in reg 137 is given the same meaning as in s 290A of the *Workers' Compensation and Rehabilitation Act 2003* (QLD), it suggests that reg 137 is concerned with specific outlays referrable to the nature of the proceedings under the Act which are allowable upon an assessment of costs. Such an interpretation does not require reg 137 to be construed as constituting an exhaustive list of recoverable outlays so as to prohibit outlays that would ordinarily be recoverable under Part 17A of the UCPR: [35]-[36].

Asia Pacific Decision of Interest

Insolvency: cross-border insolvency

Ascentra Holdings, Inc (in official liquidation) and others v SPGK Pte Ltd **[2023] SGCA 32**

Decision date: 18 October 2023

Court: Court of Appeal of Singapore

Sundaresh Menon CJ, Steven Chong JCA and Belinda Ang Saw Ean JCA

The second and third appellants are the liquidators of Ascentra appointed by the Grand Court of the Cayman Islands. SPGK Pte Ltd is incorporated in Singapore, and a wholly-owned subsidiary of Shang Peng Gao Ke, Inc ("SPGK Cayman"), which is incorporated in the Cayman Islands. In June 2021, Ascentra initiated voluntary liquidation under the *Companies Act (2021 Revision)* (Cayman Islands) and appointed Mr Robinson as the "voluntary liquidator". The Cayman Grand Court allowed the liquidation to proceed. The appellants sought to have the Ascentra's Cayman liquidation recognised in Singapore and as a "foreign main proceeding" under Art 2(f) of the SG Model Law; an order recognising the liquidators as "foreign representatives" of Ascentra under Art 2(i) of the SG Model Law; and an order granting the liquidators such powers "as are available to a liquidator under Singapore insolvency law". The primary judge declined to make the orders.

Held: allowing the appeal

- The words "under a law relating to insolvency or adjustment of debt" in Art 2(h) of the SG Model Law should be interpreted broadly to include within its ambit foreign proceedings concerning companies that are neither insolvent nor in severe financial distress. The words should not be limited to laws that are applicable only to companies in insolvency or severe financial distress: [34], [36].
- Interpreting Art 2(h) of the SG Model Law in that manner better coheres with its ordinary meaning and reflects Parliament's intention to include proceedings concerning solvent companies within the scope of the SG Model Law. This interpretation is consistent with the overall purpose of the UNCITRAL Model Law: [98]-[101], [110].
- Ascentra's Cayman liquidation is a collective proceeding under Art 2(h) of the SG Model Law because it concerns all creditors of the debtors generally and substantially all of the assets and liabilities of the debtor are dealt with in the proceeding: [104], [106]-[107].

International Decision of Interest

Taxation: value added tax

***Target Group Ltd v Commissioners for His Majesty's Revenue and Customs* [2023] UKSC 35**

Decision date: 11 October 2023

Court: United Kingdom Supreme Court

President Lord Reed, Lord Lloyd-Jones, Lord Sales, Lord Hamblen and Lady Rose

Target provides outsourced loan administration services to customers. In May 2015, Target sought a Non-Statutory Clearance from HMRC concerning its VAT liability in respect of these services, contending that they are exempt from VAT. HMRC responded with a letter setting out its position that Target's services were vatable. HMRC upheld that decision upon internal review. Target appealed to the First Tier Tribunal ("FTT"), which was unsuccessful. The Upper Tribunal also held that these services were vatable. Target appealed to the Court of Appeal, which confirmed the decision of the Upper Tribunal.

Held: dismissing the appeal

- In *Sparekassernes Datacenter* v Skatteministeriet (Case C-2/95) [1997] ECR I-3017, [1997] STC 932, it was held that "viewed broadly" and as "a distinct whole", to be exempt from VAT, the services must: have the effect of transferring funds and, change the legal and financial situation of the relevant parties: [28]. It remained unclear whether the services must directly have that effect ("narrow interpretation") or whether it was sufficient for them to have that causal effect ("wider interpretation"): [28]. The narrow interpretation is the correct one: [55]. The narrow interpretation accords with the rationale of the exemption applying to situations where there are difficulties determining the consideration of financial services and therefore the tax base for VAT liability: [19]. It seeks to exempt services that themselves effect the transfer of funds and change the legal and financial situations of the relevant parties. The exemption must also be interpreted strictly: [55]. Giving instructions is not enough even if that results in a payment or transfer: [65]. It is necessary to be involved in the execution of the transfer or payment. This requires functional participation and performance [55].

- Target's submission that the making of accounting entries is the standard modern means of effecting movements of value and that unilateral accounting entries may be sufficient to effect a transfer of payment was not accepted: [68]. This position was undermined by the FTT's factual findings that the entries in the ledgers were of "expected payments" which were "assumed to be made": [73]. Such an entry cannot effect a payment or transfer or result in a change of the legal position of the parties: [74]. The loan account was no more than a ledger, recording the effect of payments made by customers to Shawbrook but not effecting such payments: [75].