Court of Appeal
Supreme Court
Sydney

Decisions of Interest

22 March 2024 – 12 April 2024

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

Corporations: Authority

***Oliveri Legal Pty Ltd t/as Oliveri Lawyers v Cassegrain Tea Tree Oil Pty Ltd* [2024] NSWCA 74**

Decision date: 9 April 2024

Gleeson, Mitchelmore JJA, Basten AJA

As of 2008, Mr Cassegrain was one of two directors of Cassegrain Tea Tree Oil Pty Ltd (CaTTO). CaTTO's Memorandum and Articles of Association provided that directors could appoint a managing director and confer upon them such powers exercisable by the directors as they saw fit, which included executing guarantees and indemnities to secure the payment or performance of any debt or obligation.

In December 2008, Mr Cassegrain instructed Oliveri Legal Pty Ltd (Oliveri) to act for him in Supreme Court proceedings. In an initial phone call with the principal solicitor of Oliveri, Mr Cassegrain stated that he was CaTTO's managing director. This representation was also conveyed in a letter sent between the parties. Following the execution of a costs agreement on 3 December 2008, Mr Cassegrain executed a document titled "Guarantee and Indemnity" (Agreement), which was signed by Mr Cassegrain on his own behalf and on behalf of CaTTO. Mr Cassegrain also entered a retainer agreement with Oliveri (Retainer).

The Court held (Gleeson, Mitchelmore JJA, Basten AJA agreeing), dismissing the appeal:

- The Agreement bound CaTTO by reason of Mr Cassegrain's ostensible authority. Throughout communications, Ms Cassegrain was held out as having authority to bind the company: [15], [52] – [54], [66] (Mitchelmore JA, Gleeson JA agreeing). Alternatively, Basten AJA considered that the Agreement bound CaTTO because, as the alter ego of the company, Mr Cassegrain had actual authority: [94], [103].
- The Agreement constituted an indemnity, but not a guarantee. The Agreement did not involve CaTTO undertaking a secondary obligation to Oliveri for Mr Cassegrain's obligation to pay its costs (a distinctive feature of guarantees): [15], [70] – [77] (Mitchelmore JA, Gleeson JA agreeing). In dissent on this issue, Basten AJA held that the Agreement should be understood as both a guarantee and an indemnity: [111].
- The conversations between Oliveri and Mr Cassegrain did not establish a mutual assumption as between Oliveri and CaTTO that it would indemnify Oliveri under the Agreement in respect of any deferred fees. An estoppel argument necessarily fails insofar as it sought to expand the guarantee in the Agreement: [88], [91] (Mitchelmore JA, Gleeson JA agreeing). Separately, Basten AJA held that the extension of the operation of the Agreement on the basis of estoppel must be rejected: [95], [112] (Basten AJA).

Contracts: Unjust terms

***Huynh v Ledinh Sovereign Super Pty Ltd* [2024] NSWCA 78**

Decision date: 11 April 2024

Bell CJ, Payne and Kirk JJA

On 16 August 2018, a mortgage was executed, with CT Stone Pty Ltd (CT Stone) as borrower/debtor, Ms Huynh and Mr Quach (Appellants) as guarantors, and Ledinh Sovereign Super Pty Ltd (Ledinh) as lender/mortgagee. Ms Huynh and Mr Quach are the sole directors and shareholders of CT Stone.

A sum of $140,000 was advanced under the mortgage, with interest accruing at 6% per month on a compounding basis. The mortgage went into default, and Ledinh sought orders for possession of the secured property, judgments for the amount owing under the mortgage ($140,000) plus interest, and costs owing under the mortgage. The Appellants filed a cross-claim, asserting that the conduct of Ledinh in delaying the bringing of proceedings was unconscionable, and that the contract was "unjust" within the meaning of s 7 of the *Contracts Review Act 1980* (NSW) (CRA).

The primary judge held that, although the interest rate of 6% per month was not, in all the circumstances, unjust, the *compounding* element of the interest rate under the mortgage rendered the contract "unjust" and unconscionable. The primary judge held that Ledinh was entitled to: (i) possession of the property; (ii) judgment in the sum of $140,000, with *simple* interest accruing at 6% per month; and (iii) costs of the proceedings.

The issue on appeal was whether the *simple* interest rate of 6% per month was "unjust" within the meaning of the CRA.

The Court held (Bell CJ, Payne and Kirk JJA agreeing), dismissing the appeal:

- There was no inconsistency between: (i) the primary judge's finding that the combination of the very high default rate and the monthly compounding of the interest was unjust; and (ii) the primary judge's finding that the 6% monthly interest rate, in itself, was not unjust. Rather, the primary judgment made it plain that it was the combination of the rate and its compounding nature which was unjust and warranted the Court's response in varying the interest provision: [73] (Bell CJ); [85] (Payne JA); [86] (Kirk JA).
- Various undisputed facts and unchallenged findings made by the primary judge supported the conclusion that the simple monthly interest rate of 6% was not "unjust" for the purposes of the CRA: The Appellants had experience with mortgages and refinancing; the Appellants required the loan to complete renovations on one of a number of properties in their property portfolio; the Appellants received independent legal advice; Mr Quach was aware that failure to repay the loan within 3 months would trigger monthly interest rates between 4% and 6%; and Mr Quach accepted in cross-examination that he knew the risk he was undertaking, yet took that risk on the assumption that he could refinance the loan: [82]-[83] (Bell CJ); [85] (Payne JA); [86] (Kirk JA).

Unlawful arrest

***Bugmy v Director of Public Prosecutions (NSW)* [2024] NSWCA 70**

Decision date: 4 April 2024

Leeming, Mitchelmore JJA, Basten AJA

Ms Bugmy was granted conditional bail following her arrest for an offence of using a carriage service to menace or harass, contrary to s 474.17(1) of the *Criminal Code Act 1995* (Cth). It was a condition of Ms Bugmy's bail that she not contact Broken Hill Police Station unless it was an emergency.

On 28 December 2021, Mr Bugmy called Broken Hill Police station in breach of the abovesaid bail condition. Constable McCrindell then went to Ms Bugmy's residence with a sergeant and three other constables. Constable McCrindell immediately informed Ms Bugmy that she was under arrest for breaching her bail conditions. There followed resistance from Ms Bugmy.

Ms Bugmy was taken before the Local Court and pleaded not guilty to the charge of resisting an officer in the execution of his or her duty, contrary to s 58 of the *Crimes Act 1900* (NSW). In arresting Ms Bugmy for her breach of bail, Constable McCrindell was exercising power under s 77(1) of the *Bail Act 2013* (NSW), which provides that a police officer who believes, on reasonable grounds, that a person has failed to comply with, or is about to fail to comply with, a bail condition may take one of six actions, including arresting the person without a warrant and taking them as soon as practicable before a court or authorised justice. Section 77(3) provides that certain matters "are to be considered" by an officer in deciding to take action, and what action to take, under s 77(1), such as the relative seriousness or triviality of the failure or threatened failure, or whether an alternative course of action to arrest is appropriate in the circumstances.

Constable McCrindell gave evidence to the effect that he had not turned his mind to the matters in s 77(3) of the Bail Act prior to arresting Ms Bugmy. However, the Local Court held that s 77(3) did not impose mandatory considerations upon police officers that limited the power of arrest for breach of bail under s 77(1), and accordingly convicted Ms Bugmy.

The Court held (Leeming, Mitchelmore JJA and Basten AJA), granting leave to appeal, allowing the appeal, and quashing the conviction:

- The ordinary meaning of the words in s 77 of the Bail Act, supported by the extrinsic materials and the settled approach to construction of statutes authorising a power of arrest, made it plain that the lawfulness of the exercise of the arrest power under s 77(1) depended upon an officer complying with the requirements of s 77(3). It followed that the arrest was not lawful, and such resistance as Ms Bugmy offered was not resistance to a police officer in the lawful execution of his duties: [45], [64], [87]-[88] (Leeming JA, Mitchelmore JA agreeing), [97]-[102], [105] (Basten AJA).

Australian Intermediate Appellate Decisions of Interest

Contract: Give and take agreements

Bellevue Station Pty Ltd v Consolidated Pastoral Company Pty Ltd & Anor **[2024] QCA 47**

Decision date: 3 April 2024

Mullins P, Dalton JA and Applegarth J

Historically, Bellevue Station and Wrotham Park operated on the basis of an informal give and take agreement (Agreement) with respect to the boundary between the two properties.

In 2006, when Wrotham Park was owned by Great Southern Cattle Holdings Pty Ltd, and Bellevue Station was owned by NBT Pty Ltd (NBT), an Agreement was entered into. In 2009, Consolidated Pastoral Company Pty Ltd (Consolidated) purchased Wrotham Park. The contract under which Wrotham Park was purchased compelled Consolidated to enter into an Agreement with NBT; it did so in 2009.

Then, in September 2021, NBT sold Bellevue Station to Bellevue Station Pty Ltd (Bellevue). The contract for sale obliged Bellevue to enter into an Agreement with Consolidated. On 21 March 2022, Bellevue's solicitors tendered to Consolidated an Agreement in identical terms to that which was previously in effect between the parties. Consolidated refused to sign this agreement. Bellevue commenced proceedings seeking to assert both a personal and proprietary claim against Consolidated.

The Court held (Dalton JA, Mullins P and Applegarth J agreeing), dismissing the appeal:

- There is no implied obligation imposed on Consolidated by Cl 6 of the previous agreement (which stated that an incoming purchaser is to enter into a similar agreement with the continuing party). Even if there were, the promise is an agreement to agree in terms which are not certain, such that it would be considered to be void for uncertainty. It followed that there is no enforceable promise within the meaning of s 55 of the *Property Law Act 1974* (Qld): [10], [14] – [29].
- Although doubtful whether rights under the previous agreement were capable of assignment from NBT to Bellevue, even if there were, by the time of the assignment, NBT had nothing to assign to Bellevue which would assist it to (a) compel Consolidated to enter into an Agreement, or (b) allow it to exercise the rights of NBT under the previous Agreement: [30] – [36].
- The language used in the previous Agreement shows that the promises made by NBT did not touch or concern the land. The inclusion of a provision to the effect of the abovementioned Cl 6 is almost conclusive of that fact. Further, the fact there were previous Agreements between the parties' predecessors is an admissible extrinsic fact that reinforces that interpretation. Therefore, s 53 of the *Property Law Act 1974* (Qld) is inapplicable: [37] – [54].

Lease: Duty to maintain

***Brotherhood of St Laurence v Sarina Investments Pty Ltd* [2024] VSCA 46**

Decision date: 26 March 2024

Walker, Lyons and Whelan JJA

Sarina Investments Pty Ltd (Sarina) owns a three-level commercial building in Fitzroy, Melbourne (Building). The Brotherhood of St Laurence (BSL) leased the middle level of the Building for use as an office pursuant to a lease agreement dated 14 August 2014 (Lease).

In January 2020, BSL put Sarina on notice that there may be structural issues with the Building, and subsequently provided Sarina with a consulting engineer's report which recommended further investigations. Sarina obtained a report that recommended similar action, although it did not undertake any investigations in response.

Following this inaction, BSL contended that Sarina breached the obligation in Cl 14.4(a) of the Lease to 'maintain the [B]uilding in a structurally sound condition' (Maintenance Covenant), which BSL contended included an obligation on Sarina to carry out investigations having been put on notice, and Cl 14.1 of the Lease not to 'interrupt [BSL's] quiet enjoyment of the premises during the term' (Quiet Enjoyment Covenant), which BSL contended arose by reason of the uncertainty as to whether or not the Building was structurally sound. BSL relied on these alleged breaches as constituting a repudiation of the Lease.

The primary judge allowed Sarina's claim for lost rent, awarding $345.521.33.

The Court held (Walker, Lyons and Whelan JJA), allowing the appeal:

- The scope of a duty to maintain a building in a structurally sound condition will depend on the circumstances (in particular, the nature of the thing the subject of the duty), but that obligation extends to taking preventative or proactive measures to prevent a structural problem occurring. Here, a reasonable person would except that the Maintenance Covenant would oblige Sarina to conduct further investigations in response to BSL's reasonable concern that there was, or was a risk of, a structural defect in the Building: [90] – [97].
- Sarina's conduct constituted a sufficiently serious breach of a non-essential or intermediate term so as to amount to a repudiatory breach. The Maintenance Covenant was of high importance, and Sarina's breach was significant and subsisted for a substantial duration: [98] – [104].
- To obtain restitutionary relief for breach of the Quiet Enjoyment Covenant, BSL were required to establish that the entirety of the consideration it paid rent for was the ability to 'occupy and use the Premises' as a commercial office and that there was a total failure of consideration during the relevant period, which it must establish is a severable part of the whole consideration. The Court was not addressed by BSL on this issue: [119] – [123].

Asia Pacific Decision of Interest

COVID-19 Regulations

Free to Be Church Trust v Minister for COVID-19 Response **[2024] NZCA 81**

Decision date: 27 March 2024

Gilbert, Goddard and Katz JJ

Free to Be Church Trust (FTBC) represents a group of churches whose right to manifest their religious beliefs under s 15 of the *New Zealand Bill of Rights Act 1990* (NZ) (NZBORA) was limited by the vaccination requirements imposed on gatherings by the COVID-19 Public Health Response (Protection Framework) Order 2021 (Order).

FTBC, whilst accepting that the Order was justified at the time of its inception, argued that the-said justification ceased to be sufficient in early-2022 once the Omicron variant of COVID-19 was prevalent in the community, and that NZBORA required the relevant restrictions under the Order to be removed by mid-February 2022.

The High Court dismissed FTBC's judicial review application. The High Court held that the Order was a demonstrably justified limitation on FTBC's rights under s 15 of NZBORA even after the prevalence of Omicron. FTBC appealed this finding.

The Court held (Gilbert, Goddard and Katz JJ), dismissing the appeal:

- Where delegated legislation contains measures that limit rights affirmed in NZBORA in order to support a response to a public emergency such as a pandemic, it is inherent in the rationale for those measures that they will not be justified indefinitely. In these circumstances, NZBORA requires the maker of the delegated legislation to keep it under review to ascertain whether there continues to be a sufficient justification of the rights-limiting measures that it contains: [122].
- If the rights-limiting measure ceases to be justified, and therefore NZBORA-compliant, the decision maker has a duty under NZBORA to take steps to amend or revoke the delegated legislation: [123] – [125].
- In the absence of evidence squarely addressing the issue, the Court is not well placed to consider whether the review by the decision maker ought to have been conducted more rapidly, or what specific steps ought to have been taken by the relevant Minister or his advisers by particular dates. In these circumstances, the Court cannot fairly or responsibly make a finding that the Minister (or the Executive collectively) failed to act in accordance with NZBORA because he failed to amend or revoke the Order by an earlier date. In any event, the processes adopted by the Minister to remove the relevant legislation in the context of a complex public health crisis appears to have been prompt and efficient: [136] – [137].

International Decision of Interest

Undue influence

One Savings Bank PLC v Catherine Waller-Edwards **[2024] EWCA Civ 302**

Decision date: 28 March 2024

Sir Geoffrey Vos, Master of the Rolls, Lord Justice Peter Jackson, Lady Justice Falk

In 2011, Ms Waller-Edwards, while at a vulnerable period in her life, began a relationship with Mr Bishop, who was a builder then constructing three houses, including the relevant property. At the time, Ms Waller-Edwards lived in her own mortgage-free property. She then moved into the subject property with Mr Bishop. The property was held in joint names subject to a declaration of trust providing that 1% was held for Mr Bishop and 99% for Ms Waller-Edwards.

In mid-2013 Ms Waller-Edwards and Mr Bishop approached One Savings Bank plc (Bank) for a mortgage secured against the subject property. Whilst applying for a loan of £440,000, the Bank agreed to lend £384,000. So far as the Bank was concerned, £200,000 of this was to be used to pay off a previous charge on the property, £40,000 to pay off personal debts of Mr Bishop, and the remaining £142,000 was to be used to purchase another property. However, of the sum advanced, £233.801.76 was used to pay off the existing charge and personal debts, and the remainder was paid to Mr Bishop's ex-wife under the terms of a divorce settlement. Ms Waller-Edwards received no benefit from this.

The relationship ended, and Mr Bishop ceased contributing to the mortgage repayments. Ms Waller-Edwards sought to set aside the mortgage on the basis that the Bank was on notice of the undue influence exerted upon her by Mr Bishop, and because the Bank failed to take any steps to avoid being fixed with constructive notice.

The Court held (Sir Geoffrey Vos, Master of the Rolls, Lord Justice Peter Jackson, Lady Justice Falk), dismissing the appeal:

- The question of whether a lender is put in inquiry must be determined through the lens of the lender: [25] – [27].
- The primary judges were right to decide that, looking at the transaction as a whole, the fact that some 10% of the advance was used to pay debts in Mr Bishop's sole name did not, as a matter of fact and degree, turn the transaction from a joint borrowing case (where the bank was not put on inquiry) to a surety case, as in *Etridge* (where it would have been put on inquiry). In the former case, the Bank would only be put on inquiry where "the bank is aware the loan is being made for the husband's purposes, as distinct from their joint purposes": [32] – [33].
- The critical task is to look at the transaction as a whole and to decide, as a matter of fact and degree whether the loan was being made for the purposes of the borrower of the debts, as distinct from their joint purposes: [34], [36].