Court of Appeal
Supreme Court
Sydney

Decisions of Interest

28 May 2024 – 10 June 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

Consumer Protection: Misleading or Deceptive Conduct

***McMillan v Coolah Home Base Pty Ltd* [2024] NSWCA 138**

Decision date: 5 June 2024

Ward P, Leeming and Stern JJA

In 2012, Ms Kelly and Mr Booker (together, Directors) established a "home base" (Park) for "grey nomads". The Directors incorporated Coolah Home Base Pty Ltd (CHB) to purchase and hold the Park, and Home Base Solutions Pty Ltd (HBS) to manage the Park. The venture was set up as a company title arrangement, with residents buying a share in CHB entitling the holder the right to exclusive occupancy of a specific site or allotment in the Park.

Following a spate of disputes, CHB was placed into voluntary administration by the Directors in 2019. Among CHB's creditors were the Directors themselves. A deed of company arrangement (DOCA) provided for the sale of the Park to Coolah Tourist Park Ltd (CTP) (also owned by the Directors). Although CTP continued to own and operate the Park, and the appellants continued to occupy their sites, further disputes arose in relation to: (a) the nature of the appellants' ownership in the site; (b) the transfer of the Park to CTP; (c) breaches of directors duties and corporate oppression; (d) various instances of unconscionable conduct, harassment and coercion.

The Court held (Ward P, Leeming and Stern JJA agreeing), dismissing the appeal with costs:

- The appellants were not promised ownership of the sites. What the appellants obtained was not a legal estate or interest in land, but an entitlement to exclusive use and occupation deriving from their shares in CHB. The primary judge was correct to identify that the appellants did not seek relief which would've overcome the practical difficulties of subdividing the Park if specific performance was granted of the alleged promise of ownership: [236]-[285].
- The sale of the Park did not constitute oppressive conduct as it was not the Directors that caused the sale, but rather it was the administrators (not bound by CHB's constitution which specified certain matters relating to a sale of the Park) who recommended that CHB's creditors approve the DOCA. There was no error in the failure to order recission of the transfer of the Park: [290]-[308].
- Allegations of misleading or deceptive conduct must identity the particularity the representations said to have been made. In any event, reliance on the alleged representations were not established: [334]-[348].
- There was no course of "conduct" under the relevant scheme to which the descriptor of "unconscionable" could apply. Nor was there any instance of harassment or coercion: [430]-[453].

Contract: Formation

***Sinclair v Balanian* [2024] NSWCA 144**

Decision date: 7 June 2024

Leeming, Payne, Kirk JJA

A dispute arose between the appellant and respondent, which then progressed to mediation. The parties agreed to a settlement contained within a document referred to as "the Deed". The Deed, poorly drafted, designated the companies, but not the individuals, on the execution page. The Deed also contained a clause permitting execution by counterparts. The appellants argued that the Deed was only intended to take effect if and when properly executed as a deed. The respondents accepted that the Deed was not effective as a deed, but argued that a valid and binding contract had been formed and the contract extended to encompass the individuals in their personal capacities. Justice Henry accepted the latter argument.

The Court held (Kirk JA, Leeming JA and Payne JA agreeing), dismissing the appeals:

- Parties can intend that a document expressed as a deed take effect as a contract, whether or not they also intend that it operate as a deed. None of the operative clauses are premised on the guarantee having legal effect as a deed, and the execution block made no provision for the individuals to execute the document in their own capacity in the manner that would have been expected of a deed. These factors militate in favour of finding an intention that the Deed operate contractually. Surrounding circumstances can be taken into account in considering whether the parties intended to create contractual relations. Those circumstances strongly support that conclusion: [88]-[104].
- It is clear that the common intention was that the individuals would be parties to the Deed and personally bound by it, despite the absence of provision for them to sign in their personal capacity. The absence of provision to sign in a personal capacity is explicable in light of its quick and unreviewed drafting: [107]-[114].
- The focus is on whether the individuals manifest an intention that they intended to be bound personally when executing the Deed on behalf of the companies. That points to a question logically prior to construction: have the terms been agreed by the individuals in their capacity as such? This is an issue of formation: [115]-[121].
- It is permissible to take account of the surrounding circumstances in ascertaining whether an offer was accepted, which, here, offer strong reinforcement to the conclusion that a reasonable person in the position of the corporate parties would conclude that the individuals intended to bind themselves personally when signing the Deed: [123]-[152].
- It is clear that natural persons who sign explicitly in their capacity as directors may nonetheless bind themselves personally, and extrinsic evidence can be used to determine this question irrespective of the presence of ambiguity in the document: [16]-[32].

Succession: Family Provision

***Curtis v Curtis* [2024] NSWCA 136**

Decision date: 5 June 2024

Leeming, Mitchelmore JJA, Basten AJA

The deceased was Mr Barry Curtis. His son, Darran Curtis, had two sons, Blake Curtis and Brock Curtis. Blake and Brock received nothing under Barry's will and they sought family provision orders under Part 3.2 of the *Succession Act 2006* (NSW) (Act). There was conflicting evidence at trial. The grandchildren and their mother gave evidence that they lived with Barry and that Barry had assumed the role of a father figure to Blake and Brock once Darran was diagnosed with cancer in 2003. In contrast, Rodney Curtis (Barry's other son) said that Blake lived with Barry for only three months and that the family saw very little of both Blake and Brock. The appellant, Peter Curtis – Barry's brother and the executor of Barry's estate – gave evidence to similar effect. His account was supported by the evidence of two of the deceased's neighbours, one of whom had never seen Blake or Brock.

The primary judge accepted Blake's and Brock's evidence over Rodney's because of their "general honesty" and perceived inconsistencies in Rodney's evidence, and found that both respondents were at least "partly dependent" on the deceased for the purposes of s 57(1)(e)(i) of the Act. Accordingly, the primary judge granted each respondent 20% of the proceeds of sale of a house (being the estate's only substantial asset).

On appeal, the appellant argued that the primary judge erred in: (a) failing to consider the appellant's submission that the deceased had made a new will in 2009 which had the effect that the respondents would receive nothing, (b) failing to adequately address the appellant's evidence, and (c) failing to give proper weight to the neighbours' evidence.

The Court held (Leeming JA, Mitchelmore JA and Basten AJA agreeing), allowing the appeal:

- The primary judge failed to consider the significance of the 2009 will. That was objective evidence that supported the appellant's account, which was the subject of the appellant's submissions at trial: [69]-[93].
- The primary judge failed to resolve the conflict between the evidence of the respondent and the evidence of the appellant, which was said to be "generally accepted" even though it contradicted the respondents' account: [94]-[103].
- The primary judge erred in putting to one side the evidence of two neighbours who had presented as close friends of the deceased, and in failing to assess their independent evidence with regard to the whole of the evidence before the primary judge: [104]-[114].
- The primary judge erred in failing to advert at all to business records produced contemporaneously by third parties which bore directly on the quality of Barry's relationship with the respondents' mother and were therefore apt to be centrally relevant: [115]-[119].

Australian Intermediate Appellate Decisions of Interest

Negligence: *Volenti non fit injuria*

***Norman v Transport Accident Commission* [2024] VSCA 123**

Decision date: 7 June 2024

Beach, Kennedy and Taylor JJA

On 12 September 2018, Hayden Norman (Plaintiff) was a backseat passenger in a 1993 Holden Rodeo (Car) when it left the roadway and collided with a tree, suffering serious injuries. The collision was caused by the negligence of Aaron Maggs (Driver).

In August 2021, the Plaintiff commenced proceedings against the Driver, alleging that the collision was caused by the negligence of the Driver and claiming damages for injuries sustained. The Driver admitted that the collision was caused by his negligence, but alleged defences of voluntary assumption of risk and contributory negligence; the former was put on the basis that the Plaintiff knew of certain facts about the condition of the Car and earlier driving of the Car which gave rise to a risk of injury, which risk the Plaintiff freely and voluntarily agreed to incur.

The primary judge was satisfied that the Plaintiff voluntarily assumed the relevant risk, and entered judgment in the Driver's favour.

The Court held (Beach, Kennedy and Taylor JJA), dismissing the appeal:

- A defendant seeking to establish the defence of *volenti non fit injuria* must prove that the plaintiff, against whom the defence is alleged, freely and voluntarily, with full knowledge of the nature and extent of the risk he or she ran, impliedly agreed to incur it. The question of whether a plaintiff's acceptance of the risk was voluntary is generally a question of fact, and the answer to it may be inferred from the conduct in the circumstances: [72].
- In the circumstances, the jury was entitled to take the view that it was more probable than not that the activities on the first day (being negligent and dangerous driving) were intended to be, and were, repeated on the second day (the day of the incident): [78].
- The mere fact that the Driver did not drive the vehicle on 11 September, and was only a spectator to the reckless driving which occurred on that day, did not compel the conclusion that the driving on 11 September was wholly irrelevant to the determination of what kind of driving was engaged in on 12 September. It was well open to the jury to conclude that, notwithstanding the fact that the Driver did not drive on 11 September, all of the passengers in the vehicle were there for the purpose of the vehicle being driven in a careless and reckless manner in the same way it had been driven on the previous day: [80].
- Once the jury concluded (as they were entitled to) that this is what was planned to occur, and what in fact did occur, on the day of the collision, it was open to them to conclude that the plaintiff, with full knowledge of the nature and extent of the risk involved, voluntarily agreed to accept that risk: [82].

Asia Pacific Decision of Interest

Judicial review: Suspected Terrorism

***A (SC70/2022) v Minister of Internal Affairs* [2024] NZSC 63**

Decision date: 5 June 2024

Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Kós JJ

In May 2016, the New Zealand Security Intelligence Service (NZSIS) produced a briefing paper advising the Minister that the appellant intended to travel to the Islamic State of Iraq and the Levant (ISIL) for the purpose of engaging in or facilitating a terrorist act. The Minister cancelled the appellant's passport for a period of 12 months, having been satisfied of the requisite conditions under cl 2(2) of Sch 2 to the *Passports Act 1992* (NZ) (Act).

The issues on appeal were as follows: (a) did the Minister have reasonable grounds to believe the requirements of cl 2(2) of the Act were satisfied (namely, that the appellant intended to engage in, or facilitate, terrorism overseas); (b) did the Minister fail to address whether his decision was a reasonable limit on the appellant's rights under the *New Zealand Bill of Rights Act 1990* (Bill of Rights), and if so, what are the consequences of that; (c) was the process adopted by the Minister unfair or unreasonable.

The Court held (Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Kós JJ agreeing) allowing the appeal and setting aside the decision of the Minister:

- The Minister's assessment of the appellant's intention to engage in, or the possible facilitation of, a terrorist act was premised on a contingency: namely, "should [the appellant] successfully travel to Syria and join a terrorist group". That introduces an impermissible conditionality into the assessment of the appellant's intention and the danger she posed to Syria: [97]-[99].
- Further, cl 2(2) required that there be evidence that the person intended not only to travel to the caliphate but also to act in a way that facilitated the commission by ISIL of one or more terrorist acts. While it was not necessary to identify such intended acts with precision, it was necessary that the Minister be satisfied that the person's intention was not just to travel to the caliphate and/or to join ISIL. The Minister could not have been reasonably satisfied: [113]-[116].
- There was nothing to indicate the Minister was advised to, or did, address the reasonableness of the limit on that right arising from a cancellation decision and conclude that the limit on the appellant's freedom of movement was justified, given the circumstances: [139]-[141].
- The briefing was not only not "fair, accurate and adequate", it also did not provide an adequate basis for the Minister to form the necessary belief on reasonable grounds that the appellant was a danger to the security of Syria because she intended to facilitate a terrorist act: [142]-[152].

International Decision of Interest

First Amendment

National Rifle Association of America v Vullo **602 US ____ (2024)**

Decision date: 30 May 2024

Roberts CJ, Thomas, Alito Jr, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett, Jackson JJ

The National Rifle Association (NRA) sued respondent Maria Vullo - former superintendent of the New York Department of Financial Services (DFS) - alleging that Vullo violated the First Amendment by coercing DFS-regulated parties to punish or suppress the NRA's gun-promotion advocacy.

In brief, the NRA contracted with DFS-regulated entities to administer insurance policies the NRA provided to its members, which Chubb Limited and Lloyd's of London (Lloyd's) would then underwrite. In 2017, Vullo began investigating one of these policies (Carry Guard) on a tip passed along from a gun-control group. The investigation revealed an impropriety, and the investigation was extended by Vullo to other NRA-affiliated policies.

Then, in 2018, Vullo met with executives at Lloyd's, expressing her views in favour of gun control, and told the Lloyd's executives that "DFS was less interested in pursuing [these infractions]… so long as Lloyd's ceased providing insurance to gun groups, especially the NRA." Accordingly, Lloyd's scaled back its NRA-affiliated businesses. Vullo then issued guidance letters to DFS-regulated entities encouraging those entities to reconsider dealings with the NRA.

The Court held (Sotomayor J, Roberts CJ, Thomas, Alito Jr, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett, Jackson JJ agreeing), remitting the matter for further proceedings consistent with the opinion:

- While a government official can share their views freely and criticise particular beliefs in the hopes of persuading others, they may not use the power of their office to punish or supress disfavoured expression.
- Here, the NRA plausibly alleged that Vullo violated the First Amendment by coercing DFS-regulated entities into disassociating with the NRA in order to punish or suppress gun-promotion advocacy. Vullo made clear she wanted Lloyd's to disassociate from all gun groups, although there was no indication that such groups had unlawful insurance policies similar to the NRA's.
- The NRA's allegations, if true, highlight the constitutional concerns with the kind of strategy that Vullo purportedly adopted. The takeaway is that the First Amendment prohibits government officials from wielding their power selectively to punish or suppress speech, directly or (as alleged here) through private intermediaries.