Court of Appeal
Supreme Court
Sydney

Decisions of Interest

28 August 2024 – 12 September 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

Succession: Contested Grant of Thai Will

Anderson v Yongpairojwong **[2024] NSWCA 220**

Decision date: 12 September 2024

Bell CJ, Leeming and Mitchelmore JJA

Ms Amonrat Chanta (Amy) was the matriarch of a chain of restaurants operating under the "Chat Thai" brand. Amy died on 10 March 2021, and was survived by her son, Mr Kulphat Laoyont (Pat), and daughter, Ms Palisa Anderson (Palisa). Amy executed two wills: one in New South Wales in 2017 (the NSW Will), and the other in Thailand on 24 June 2020 (the Thai Will). The NSW Will provided, inter alia, that Pat and Palisa would receive a roughly even split of Amy's shares in the companies used to operate her business (the CT Group) and also share the residue of her estate. However, the Thai Will provided that only Pat would receive shares in the CT Group and also the residue. A week after the Thai Will was executed, Amy's brother, Mr Kijchai Yongpairojwong, transferred the CT Group shares to Pat, at Amy's request. Palisa propounded the NSW Will and contended that Amy lacked testamentary capacity and did not know and approve of the contents of the Thai Will.

The Court held (Bell CJ, Leeming JA and Mitchelmore JA agreeing), dismissing the appeal:

- Palisa failed to establish that the primary judge erred in holding that Amy had testamentary capacity when executing the Thai Will. The primary judge justifiably attributed limited weight to the expert medical reports in determining Amy's testamentary capacity at the time of executing the Thai Will in circumstances where the experts had not examined Amy; their reports did not take into account various communications by Amy shortly after execution of the Thai Will or lay evidence bearing upon Amy's cognition at the time that the Thai Will was executed; and Amy's medical records did not support the conclusion that she lacked capacity: [138]-[159] (Bell CJ); [180] (Leeming JA); [186] (Mitchelmore JA).
- Palisa failed to establish that the primary judge erred in finding that Amy knew and approved of the contents of the Thai Will. The Appellant failed to show that there were "suspicious circumstances" surrounding the making of the Thai Will. In turn, the presumption that the testatrix knew and approved of the contents of the Thai Will applied, and was not successfully rebutted: [160]-[173] (Bell CJ); [180]-[185] (Leeming JA); [186] (Mitchelmore JA).
- Where parties seek to contend that there are "suspicious circumstances" surrounding the making of a will, those circumstances should be pleaded and particularised so that they can be appropriately addressed by evidence and submissions: [163] (Bell CJ); [184] (Leeming JA); [186] (Mitchelmore JA).

Equity: Trusts and Estoppels

***Pamplin v Irwin* [2024] NSWCA 213**

Decision date: 28 August 2024

Bell CJ, Leeming JA, Griffiths AJA

In 2002, Mr Adrian Pamplin, now deceased, and his brother Mr Lionel Pamplin, transferred assets including shares in various companies to their mother Ms Marie Pamplin, the first respondent. As part of this restructure, a new company was also constituted, Dennis G Pamplin Pty Ltd as trustee of a discretionary trust (the DGP Family Trust), of which Marie was sole director and shareholder. The brothers were members of the Nomad Motorcycle Club and had been the subject of investigations by the NSW Crime Commission in the 1990s. Ms Ann Irwin was Adrian's former partner and the administratrix of Adrian's deceased estate.

The principal issue on appeal was whether the primary judge erred in upholding Ann's case that most of the assets accumulated by companies controlled by Lionel and Adrian should be made the subject of equitable relief. By cross-appeal, Ann sought orders in addition to those made by the primary judge.

The Court held (Leeming JA, Bell CJ and Griffiths AJA agreeing), allowing the appeal in part and dismissing the cross-appeal:

- On the appeal, there was no basis to interfere with the primary judge's findings that Marie was to hold the transferred shares for the brothers' benefit. The transfers were made at the time the Commission was seeking to encumber assets the brothers beneficially owned, and while the brothers formally resigned as directors of the corporate trustee after the transfers were executed, they continued informally to control the operations of the trustee as shadow directors: [70]-[82]
- There was no reason in principle that an estoppel may not extend to a power conferred on a trustee where the beneficiaries of the trust have acted upon the estoppel. The primary judge's order did not preclude the trustee from considering any or all of the discretionary objects: [93]-[107].
- On the cross-appeal, the primary judge did not err in rejecting an estoppel with retrospective effect because that would have had the capacity to affect distributions made in the decade after Adrian's death: [108]-[112].
- The primary judge did not err in finding that the $451,000 was owing to Ann, but Ann would obtain a double recovery if she were to receive the full $451,000 and were also to recover the amounts of tax paid on her behalf many years ago: [116]-[130].
- The essence of the transactions in mid-2002 was the transfer of ownership and nominal control of Mircon from Lionel and Adrian to Marie, reflected in the transfer of shares in the company and the resignation of the brothers as directors. All that reflects the fact that the subject matter of the trust was the company, not the assets of the company: [143]-[146].

Assessment of Damages: Negligence

Manhattan Homes Pty Limited v Burnett **[2024] NSWCA 219**

Decision date: 11 September 2024

Leeming JA, Harrison CJ and CL, Price AJA

Mr Gary Burnett was seriously injured on 27 February 2019 while working on a building site at Greenhills Beach where Manhattan Homes Pty Ltd was constructing a two storey dwelling. On that day, Mr Burnett walked on unsecured boards on the second level of the house which partly covered a void for the stairwell, and fell to the floor below. He sued Manhattan claiming damages for negligence. At the time of the accident, Mr Burnett was employed by Griswold's Outdoor Xmas Pty Ltd, a company of which he was the sole director and shareholder. Manhattan and Griswold's filed cross-claims against each other seeking contribution or indemnity as joint tortfeasors pursuant to s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW).

The principal issue on appeal was whether the primary judge erred in failing to find Mr Burnett guilty of contributory negligence. By cross-appeal, Mr Burnett challenged the primary judges award for non-economic loss and domestic assistance.

The Court held (Harrison CJ at CL and Leeming JA, Price AJA agreeing), allowing the appeal and dismissing the cross-appeal:

- There is no analytic distinction between "inadvertence" and "contributory negligence". Mr Burnett's negligence was that he failed to employ his recent knowledge of the risk when he walked on the boards with a fresh and vivid memory that they were unsupported. His fault was that he failed to heed what he knew. Manhattan, by way of contrast, could well have refreshed his recollection or reminded him of what he knew by a warning sign or a physical barrier on the first floor. Mr Burnett negligently contributed to his own loss and damage. Compared to the negligent failings of Manhattan which have been identified by her Honour and which are not challenged in this appeal, Mr Burnett's contribution should be assessed at 20%: [33].
- The calculation of damages for future domestic assistance specifically incorporated a discount of 15% for vicissitudes. In the absence of any evidence pointing to the likelihood of an accelerated or extended period of old age, the discount allowed was sufficient in this case to account for it and no special or other discount was necessary: [85]-[86].
- Part of Mr Burnett's claim for out-of-pocket expenses included a claim for airfares to Thailand to accompany his wife. The primary judge accepted Mr Burnett's calculations in relations to his claim for airfares and awarded the total sum of $162,394. There was no causal connection between anything that happened to Mr Burnett as the result of his accident and the need for him to travel anywhere. The primary judge's award for the cost of airfares was not supported by the evidence and was erroneous: [87]-[90].

Australian Intermediate Appellate Decision of Interest

Limitation of Actions: Medical Negligence

***Waldron v O'Callaghan* [2024] VSCA 196**

Decision date: 10 September

Ferguson CJ, Macaulay JA, Tsalamandris AJA

Ms Claire O'Callaghan was a patient of Mr Mark Waldron. Mr Waldron was a general practitioner and Ms O'Callaghan was a registered nurse. Ms O'Callaghan alleged that Mr Waldron was negligent in his treatment and management of her from 4 March 2005 until around 19 August 2012, when she suffered a stroke. During this period, Mr Waldron and Ms O'Callaghan were married to each other. Ms O'Callaghan claimed damages for injuries arising out of a stroke, which she alleged was caused by Mr Waldron's negligence. Mr Waldron denied negligence and pleaded that Ms O'Callaghan's claim was statute-barred pursuant to s 27D of the *Limitation of Actions Act 1958* (Vic) (the Act). Under s 27K, the court has power to extend limitation periods if it is just and reasonable to do so.

The primary judge granted Ms O'Callaghan an extension of time for those aspects of the claim that would otherwise have been statute-barred. Mr Waldron appealed the primary judge's decision.

The Court held (joint judgment of Ferguson CJ, Macaulay JA and Tsalamandris AJA), dismissing the appeal:

- Grounds 1 to 4 of Mr Waldron's appeal related to the primary judge's finding as to the date of discoverability pursuant to s 27F(1) of the Act; specifically when Ms O'Callaghan knew or ought to have known of the fact that her claimed personal injury was caused by the fault of Mr Waldron: [31].
- Because s 50D(1) of the *Limitation Act 1969* (NSW) was substantially identical to s 27F of the Act, the Court relied on the reasoning of Basten JA (as his Honour then was) in *Baker-Morrison v State of New South Wales* [2009] NSWCA 35, and Beazley JA in *State of New South Wales v Gillett* [2012] NSWCA 83, confirming that the test for discoverability required knowledge by the plaintiff of the key factors necessary to establish legal liability: [55]-[68].
- The primary judge was correct in her finding that Ms O'Callaghan did not know her injury was caused by the fault of Mr Waldron prior to 21 December 2017. When Ms O'Callaghan contacted her solicitors she had no actual knowledge, but rather a grievance, suspicion and belief that her husband was in some way responsible: [82]-[87].
- Grounds 5 and 6 of Mr Waldron's proposed grounds of appeal related to the primary judge's decision to grant Ms O'Callaghan an extension of time, pursuant to s 27K of the Act. In circumstances where there was no error in the primary judge's finding as to the date of discoverability, it was not necessary for the Court to determine this ground of appeal: [94]-[105].

Asia Pacific Decision of Interest

Legal Profession – Professional Conduct

***Law Society of Singapore v Seah Zhen Wei Paul and another matter* [2024] SGHC 224**

Decision date: 4 September 2024

Belinda Ang Saw Ean JCA, Woo Bih Li JAD and See Kee Oon JAD

The Law Society of Singapore (the Law Society) brought two applications against Mr Seah Zhen Wei Paul (Mr Seah) and Mr Rethnam Chandra Mohan (Mr Mohan), respectively, for them to be sanctioned under s 83(1) of the *Legal Profession Act 1966* (Singapore, cap 161, 2009 rev ed). The respondents were counsel involved in litigation. Mr Seah represented the appellants, and Mr Mohan represented the respondent. The key question before the Court was whether the settlement of High Court Suit No 965/2012 (Suit 965) rendered the appeal in CA/CA 146/2019 (CA 146) academic; and if the respondents knowingly allowed CA 146 to continue before the Court of Appeal despite the settlement.

The Court held (Belinda Ang Saw Ean JCA, Woo Bih Li JAD and See Kee Oon JAD agreeing), granting the application with costs:

- Evident from the plain reading of the structure of the terms of settlement was the existence of a scheme that Mr Seah and Mr Mohan had willingly acted upon to bring the appeal before the Court of Appeal: [103].
- The factual matrix common to both Mr Seah and Mr Mohan was them embarking on the scheme which involved (a) not discontinuing Suit 965 and the counterclaim pending the outcome of CA 146 when Suit 965 was already settled; and (b) not informing the Court of Appeal about the settlement at the earliest opportunity, but only if it became necessary to do so. And the query common to both Mr Seah and Mr Mohan was whether all of that (ie, the scheme) was meant to mislead the Court of Appeal by giving the impression that the appeal was alive and that there was in existence a real controversy of importance between the parties to CA 146 for a five-judge coram to resolve: [4].
- To the extent that Mr Seah and Mr Mohan as officers of the court knew that the court would be misled or were aware that there was a risk that it might be misled, they were required to take steps to avoid that result: [37]-[46].
- Importantly, Mr Seah and Mr Mohan, who participated in CA 146 as advocates conducting litigation and exercising rights of audience, undoubtedly owed a duty to the court in relation to an advocate and solicitor's crucial role in the legal system: [4].
- Mr Mohan was sentenced to three-years' suspension commencing on 1 June 2024. Mr Seah was sentenced to three-years' suspension commencing on 17 August 2024: [172].

International Decision of Interest

Employment: Termination of Contract

Tesco Stores Ltd v Union of Shop, Distributive and Allied Workers and others **[2024] UKSC 28**

Decision date: 12 September 2024

Lord Reed (President), Lord Lloyd-Jones, Lord Leggatt, Lord Burrows, Lady Simler

In 2007, Tesco Stores Limited (Tesco) planned to close some existing distribution centres and open new ones. To retain staff, it offered a significant enhancement to the pay of staff willing to relocate from closing centres to new centres (Retained Pay). The terms of Retained Pay were confirmed in a collective agreement made between Tesco and its recognised union (USDAW), which was then incorporated into individual employment contracts. Retained Pay was contractually described as "permanent", subject to alteration in specific circumstances. In January 2021, Tesco wished to bring Retained Pay to an end. It gave notice to the relevant staff that it intended to seek their agreement to remove Retained Pay from their contracts in exchange for a lump sum payment. If an employee did not agree to this change, their employment contract would be terminated, and they would be offered re-engagement on the same terms but with the Retained Pay term removed. Several employees in receipt of Retained Pay applied to the High Court, seeking declarations as to the true meaning of the Retained Pay term, and an injunction to restrain Tesco from terminating their employment to remove the Retained Pay term. The High Court allowed the claim and granted the injunction. The Court of Appeal unanimously allowed Tesco's appeal. USDAW now appeals to the Supreme Court.

The Court held (Lord Burrows and Lady Simler, Lord Lloyd-Jones agreeing. Lord Leggatt and Lord Reed agreeing, in concurring judgments), allowing the appeal:

- The correct interpretation of the term is that the right to receive Retained Pay will continue for as long as employment in the same role continues, subject only to the qualifications within the Retained Pay term: [36]-[42].
- Applying the business efficacy test, it is necessary to imply a term in the contracts to qualify Tesco's right to dismiss on notice so that it cannot be exercised for the purpose of depriving the claimants of their right to permanent retained pay: [43]-[48].
- Although a mandatory injunction indirectly effecting specific performance of a personal service obligation is generally not permitted, it is permitted where it is "otherwise just" and there has been no breakdown of confidence between employer and employee: [63]-[72].
- An injunction amounting to indirect specific performance is the appropriate remedy; the assessment of damages for wrongful dismissal is difficult, prone to error and has traditionally not reflected non-pecuniary loss: [77]-[81].