Court of Appeal
Supreme Court
Sydney

Decisions of Interest

13 August 2024 – 27 August 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.

Contents

New South Wales Court of Appeal Decisions of Interest 2

Australian Intermediate Appellate Decision of Interest 5

Asia Pacific Decision of Interest 5

International Decision of Interest 7

New South Wales Court of Appeal Decisions of Interest

Administrative Law: Jurisdictional Error

***Bingman Catchment Landcare Group Incorporated v Bowdens Silver Pty Ltd* [2024] NSWCA 205**

Decision date: 16 August 2024

White and Adamson JJA, Price AJA

Bingman Catchment Landcare Group Incorporated, challenged the decision of the primary judge in the Land and Environment Court, dismissing an application for judicial review of a decision of the Independent Planning Commission (IPC) and granting development consent to Bowdens Silver Pty Ltd, for an open cut silver, lead, and zinc mine. The development for which approval was sought would be a "State significant development" for the purposes of Div 4.7 of the *Environmental Planning and Assessment Act 1979* (NSW) (the EP&A Act). The question on appeal was whether the IPC's failure to consider the environmental impacts of a 66kV transmission line (which provided power to the open cut silver, lead, and zinc mine) meant that it had fallen into jurisdictional error.

The Court held (White JA, Adamson JA agreeing, and Price AJA dissenting in part) allowed the appeal:

- The development consent granted on 3 April 2023 in respect of the Bowdens Silver Project as void and of no effect: [118] (White JA, Adamson AJA agreeing).
- The primary judge erred in concluding that the 66kV transmission line was not part of a "single proposed development that is State significant development" within the meaning of s 4.38(4) of the EP&A Act: [17], [54], [55].
- As the proposed mine would require electrical power, the likely impacts of the transmission line providing the power were a mandatory consideration for the IPC in considering the likely effects of the mine itself, pursuant to s 4.15(1)(b) of the EP&A Act: [24], [71].
- The IPC made no mention of the transmission line in its statement of reasons. It should be inferred that it did not take the transmission line into account in its determination: [102]-[105] (White JA, Adamson JA agreeing).
- Even though the IPC and Department were misguided in believing the subsequent application would be made under Pt 5, this does not preclude Bowdens Silver Pty Ltd from making its application regarding the transmission line at a later date: [121] (Price AJA, in dissent).
- As a later application can be made, the consent should not be declared to be "void and of no effect", but rather should merely be suspended. This approach would promote the orderly and economic use of the land: [129], [135] (Price AJA, in dissent).

Contracts: Express Terms

***Michael Hill Jeweller (Australia) Pty Ltd v Gispac Pty Ltd* [2024] NSWCA 211**

Decision date: 27 August 2024

Bell CJ, Payne JA, Basten AJA

From September 2003, Michael Hill purchased packaging (small and large paper bags) for their retail jewellery and accessories business from Gispac Pty Ltd (Gispac). The parties entered into sales agreements from time to time until 2017, when a dispute arose as to the terms upon which the parties had contracted. The issue was whether three sales agreements executed in May 2014 and May 2015 respectively incorporated Gispac's standard Terms and Conditions of Trading (the 2012 Terms). Gispac alleged that by ticking a box within the sales agreements, Michael Hill was bound by the 2012 terms, including a commitment to purchase a minimum quantity of bags quarterly and annually and an obligation to purchase its packaging exclusively from Gispac.

Gispac commenced proceedings in the court below alleging that Gispac was entitled to the payment of invoices and damages for breach of the exclusivity clause. The primary judge upheld Gispac's claims. Michael Hill appealed on the basis that the primary judge erred in finding that the 2012 Terms had been incorporated into the sales agreements, that the terms of the sales agreements were consistent with the 2012 Terms and the construction of the exclusivity clause (should the 2012 Terms be found to be incorporated).

The Court held (Bell CJ and Payne JA, Basten AJA agreeing in part) allowing the appeal in part:

- The commercial practice between the parties and the form of the sales agreements were not consistent with the obligations to purchase a minimum quantity under the 2012 Terms; [191]-[200] (Basten AJA, Payne JA and Bell CJ agreeing).
- The 2012 Terms had been incorporated into the sales agreements: [6], [14] (Bell CJ) [22]-[24] (Payne JA).
- The primary judge had erred in his quantification of the amount owed by Michael Hill under the exclusivity clause, a matter conceded on the appeal. However, leave was denied to advance a further ground on quantification as the factual premise on which the ground was based had not been advanced in the court below. The Court reduced the judgment in favour of Gispac to $359,858:[27]-[29] (Payne JA, Bell CJ agreeing).
- Where the parties have a long-term relationship, the incorporation of specific terms depends in part on the contextual background: [139]. Although Michael Hill's practice of ticking the box changed, that could be accounted for by a change of personnel at Gispac and did not demonstrate an intention to vary the terms on which the parties were operating: [177]-[178] (Basten AJA in dissent).

Estoppel: Proprietary Estoppel

Sckaff v Sckaff [2024] NSWCA 207

Decision date: 19 August 2024

Leeming, Mitchelmore and Stern JJA

The appellants, Mr Richard Sckaff and his wife, Mrs Nada Sckaff, are the registered proprietors of a residential property located in Dulwich Hill, Sydney (the Property). The respondents, George Sckaff lived in the Property since around 1990, and Anne Thompson lived in the Property since 2001. George and Anne paid utilities but never paid rent and treated the Property as their family home. In December 2014, Richard served an eviction notice on George and Anne, and, in May 2017, he commenced proceedings in the NSW Civil and Administrative Tribunal for an order terminating their tenancy. In February 2018, George and Anne brought proceedings in the Equity Division seeking a declaration that the appellants held the Property on trust together with orders requiring the transfer of the Property to them. The primary judge found that Richard and Nada held the Property on trust for George and Anne. By their appeal, Richard and Nada challenged the primary judge's decision.

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

- The primary judge erred in declining to make a finding as to who paid for the Property. The proportion of savings needed for the appellants to fund the purchase of the Property was not "extraordinary" given his personal circumstances over the relevant period. The primary judge had also relied on his own calculations of interest payments that were not put to Richard or the experts, which was procedurally unfair. The evidence before the primary judge supported a finding that Richard paid the purchase price of the Property: [63], [67], [72], [75].
- There were conversations between Richard and George in which Richard had disabused George of his assertion that he was the owner of the Property. His Honour erred in not making findings about those conversations and yet also concluding that Richard had not done enough to disabuse George of his belief as to his ownership: [142], [145]-[147].
- Richard did not acquiesce in George's belief that he owned the Property, and his conduct was not unjust or unconscionable in a manner that equity would intervene to protect by way of a constructive trust. The primary judge erred in reaching the contrary conclusion: [158].
- Following from the appellants' concession that the respondents should be compensated for the improvements to the Property effected by the respondents, the Court ordered compensation in a sum equal to the increase in the capital of the value of the Property by reason of the improvements: at [164], [172].

Australian Intermediate Appellate Decision of Interest

Administrative Law: Judicial Review

Chiodo Corporation Operations Pty Ltd v Douglas Shire Council [2024] QCA 153

Decision date: 23 August 2024

Flanagan JA, Brown AJA, Bradley J

On 28 September 2021, Douglas Shire Council (Council) refused an application by Chiodo Corporation Operations Pty Ltd (Chiodo) for a development permit for a material change of use to facilitate the development of a luxury five-star resort complex on vacant land at 71-85 Port Douglas Road, Port Douglas (development application). On 14 November 2023, Chiodo's appeal to the Planning and Environment Court of Queensland (P&E Court) against the refusal was dismissed and the development application was refused. By application filed on 20 December 2023, Chiodo applied for a grant of leave to appeal the decision and orders of the P&E Court. The application was made pursuant to s 63 of the *Planning and Environment Court Act 2016* (Qld).

The Court held (Flanagan JA, Brown AJA and Bradley J agreeing), dismissing the appeal with costs:

- For leave to be granted, Chiodo must not only demonstrate an arguable error or mistake in law but must also establish that the error is material in that it could have materially affected the decision of the P&E Court: [4].
- While the P&E Court had broad discretion in determining the appeal, as the development application required an impact assessment, it was necessary that the exercise of the discretion be based on an assessment carried out against the assessment benchmarks in the Planning Scheme to the extent that they were relevant. It was only necessary to carry out an assessment against the assessment benchmarks in the Planning Scheme to the extent that they were put in dispute by the parties: [5].
- The primary judge made no error in their conclusion that the proposed development was inconsistent with s 3.5.5.1(2). The primary judge's conclusion was primarily based on a determination that the proposed development was discordant with the landscape character along Port Douglas Road, given there was "an obvious difference in visual effect between a vegetated hill or form emerging from the landscape and more scaled-back building forms that are dispersed amongst densely planted landscaping": [99].
- For the reasons identified, a favourable finding that the proposed development complied with each of the relevant four provisions, could not have materially affected the decision of the P&E Court in light of these ultimate findings: [100].

Asia Pacific Decision of Interest

Employment Relations: Employment Status of Uber Drivers

***Rasier Operations BV v E Tū Inc* [2024] NZCA 403**

Decision date: 26 August 2024

Goddard, Ellis and Wylie JJ

Four Uber drivers sought declarations of their employment status in the Employment Court. Chief Judge Inglis granted a declaration that the four Uber drivers were employees of one or more of the appellant companies for the purposes of the Employment Relations Act 2000 (ERA). Uber submitted that the Chief Judge's observations and her application of s 6 involved misdirections and errors of law. Uber argued that her approach was inconsistent with the text of s 6 and with the guidance provided by the Supreme Court in *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721. The respondent unions submitted that Uber had misconstrued the aspects of the Employment Court judgment it was criticising, and the judgment reflected an orthodox approach to the interpretation and application of s 6 of the ERA by reference to the Supreme Court's guidance in *Bryson*. Business New Zealand and the New Zealand Council of Trade Unions were granted leave to intervene and provided submissions on the operation of s 6 in the context of new ways of working involving online platforms.

The Court held (Goddard, Ellis and Wylie JJ), dismissing the appeal:

- The Employment Court erred by misdirecting itself on the application of s 6 of the ERA. The Chief Judge misdirected herself in the way she framed the s 6 test; in failing to take as a starting point of the inquiry the express terms of the agreement and other relevant contractual documents; and in the approach she adopted to the common law tests: [118]-[137].
- In applying s 6, the court distinguished between two stages in the inquiry. The first stage involved identifying the substance of the parties' mutual rights and obligations as a matter of reality. The second stage involved determining whether those rights and obligations amount to a contract of service by applying the common law test for what qualifies as a contract of service to the real (substantive) relationship between the parties. That test turns on the control test, the integration test, and the fundamental test: [133]-[137].
- The court was satisfied that it was appropriate to apply the correct test under s 6 of the ERA. There was no material factual contest between the parties, and it was in the interests of justice that the question be determined now: [141]-[142].
- In respect of the four drivers, the s 6 test was met. The real nature of the relationship between the drivers and Uber was that they were employees of Uber at the times they were logged into the Uber driver app. The conclusion reached by the Chief Judge was correct: [235]-[236].

International Decision of Interest

Commonhold and Leasehold Reform

A1 Properties (Sunderland) Ltd v Tudor Studios RTM Company Ltd [2024] UKSC 27

Decision date: 13 August 2024

Lord Briggs, Lord Sales, Lord Hamblen, Lord Leggatt and Lord Stephens

This appeal concerned the right to manage a former factory in Leicester, now converted into student accommodation. The building mainly comprised of "study studios", with some communal areas. The study studios were held by investor tenants on 250-year leases in tripartite form between the freeholder, the investor tenant and Tudor Studios Management Company Ltd (the Management Company). A1 Properties (Sunderland) Limited (A1 Properties), held the common room, the laundry, the gym and the reception area on four 999-year leases. The Commonhold and Leasehold Reform Act 2002 (the 2002 Act) enabled tenants who held long leases of flats in a self-contained building to acquire the right to manage that building. The investor tenants sought to acquire the right to manage the building through the respondent's right to manage company, Tudor Studios RTM Company Limited (Tudor Studios). Tudor Studios gave the claim notice required by section 79 of the 2002 Act to the freeholder and to the Management Company, but not A1 Properties. The Management Company served a counter-notice stating that Tudor Studios was not entitled to acquire the right to manage the building because it had not complied with the procedure set out in the 2002 Act.

The Court held (Lord Briggs and Lord Sales, Lord Hamblen, Lord Leggatt, Lord Stephens agreeing), dismissing the appeal:

- Tudor Studios' failure to serve a claim notice on a landlord as required by section 79(6)(a) of the 2002 Act did not invalidate the transfer of the right to manage. A failure to give a claim notice under section 79(6) of the 2002 Act renders the transfer of the right to manage voidable. It did not render it automatically invalid from the outset: [87].
- It was usually to be inferred that Parliament intends that there should be a reasonable degree of certainty regarding property rights and contractual rights. It was also usually to be inferred that Parliament intends that a person should not be deprived of property or contractual rights without being afforded a fair opportunity to enter objections. That inference was reinforced in the present context by the requirement of service of a claim notice on the wide range of persons identified in section 79(6) of the 2002 Act. It was not sufficient to say, therefore, in relation to persons whose property or contract rights are to be taken away or subject to significant qualification, that their right to participate may be ignored if they are an intermediate landlord with no power of management: [64], [66]-[67], [96].