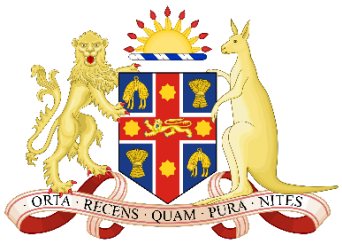

Decisions of Interest

13 September 2024 – 27 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 Probate

***Wild v Meduri* [2024] NSWCA 230**

Decision date: 26 September 2024

Bell CJ, White and Kirk JJA

Elisabetta Meduri (the deceased) died aged 98 on 8 June 2020. She was survived by six children: Concetta (Connie), Rosa (Rose), Antonio (Tony), Dominico (Dominic), Giuseppe Jnr (Joseph) and Giovanni (John). She was predeceased by her husband, Giuseppe Meduri (Giuseppe), who died on 26 July 2009. Following Elisabetta's death, three sets of proceedings were brought and determined together before the primary judge on 23 February 2023. The primary judge held that the 2009 Will was valid, and dismissed the Probate Proceedings brought by Rose and upheld the cross-claim brought by Dominic and John. Separate appeals were brought by Rose "from the whole of the decision" of the primary judge, including the decision as to costs, in relation to two of those proceedings, namely the Probate Proceedings and the Trust Proceedings.

The Court held (Bell CJ, White JA and Kirk JA agreeing), dismissing the appeals in both proceedings:

- There should be no disturbance of the costs orders in either proceeding. The primary judge's discretionary was entirely reasonable and not affected by any error of principle warranting appellate intervention: [271]-[277].
- The primary judge gave appropriate weight to the expert evidence in circumstances where neither expert had ever met the deceased and their opinions were based on a process of reverse extrapolation from medical records relating to the deceased in 2014: [214].
- Having closely reviewed all the evidence, including the medical records, the joint report and cross examination of the experts, and having taken into account the limited successful factual challenges, bearing in mind the primary judge's advantages in his assessments of the credibility of the witnesses, grounds 1-3 of the appeal in the Probate Proceedings were rejected: [258].
- When affidavit evidence is given in direct speech but prefaced by "words to the effect" or some like expression, a witness is not providing or purporting to provide a verbatim recollection of a conversation and should not be penalised for giving evidence in such a form. The traditional New South Wales practice of drafting should not be departed from: [244]-[254].

Consumer Law: Misleading or Deceptive Conduct

***191 Bells Pty Ltd v WJ & HL Crittle Pty Ltd* [2024] NSWCA 221**

Decision date: 16 September 2024

Ward P, Payne and Stern JJA

On 23 March 2022, 191 Bells Pty Ltd (Purchaser) and WJ & HL Crittle Pty Ltd (Vendor) executed a put and call option deed (Option Deed) with respect to land located at 191 Bells Lane, Meroo Meadow in New South Wales (Land). The execution of the Option Deed followed the execution of an exclusivity agreement (Exclusivity Agreement), which provided for a three-week exclusivity period (Exclusivity Period). The Exclusivity Agreement stipulated that the Vendor was to assist the Purchaser as far as possible in the due diligence process. During the Exclusivity Period, the Purchaser engaged JKE Environments Pty Ltd (JKE) to conduct contamination screening of the Land. JKE returned a draft report, which stated that there were no indicators of contamination observed during JKE's site inspection. The parties subsequently entered into the Option Deed, which attached disclosure documents that did not disclose the presence of contamination. On 20 May 2022, JKE communicated to the Purchaser, in connection with further work JKE undertook, potential contamination issues. JKE then issued a final report on 14 June 2022, which disclosed the presence of two localised waste burial pits (Pits). It was discovered that the Pits contained asbestos, tyres and deceased animals.

The Purchaser commenced proceedings in relation to the failure of the Vendor to disclose the contamination. The primary judge subsequently dismissed the claim.

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

- Clauses 3(a)(i)-(iv) of the Exclusivity Agreement did not impose upon the Vendor a positive obligation to disclose all matters to the Purchaser in connection with the due diligence process. The primary judge's construction of clause 3(a)(iii) did not render nugatory or mere surplusage the words "as far as possible". Rather, those words simply relate to the extent of the assistance to be provided, but do not go so far as to impose a positive obligation of voluntary disclosure: [115]-[132].
- Did not accept the Purchaser's submission that the primary judge fused two independent approaches to misleading and deceptive conduct under s 18 of the ACL. The rejection of the positive misrepresentation case was not based on a consideration of whether there was a reasonable expectation that the falsity of a misrepresentation would be disclosed; instead, it was rejected because there was no such misrepresentation in the first place: [145]-[153].
- The primary judge did not approach the fact-finding process in a singular or fragmented fashion. It is unfair to the primary judge to parse his Honour's reasons, prepared on an urgent basis to meet the parties' needs, as if they were a statute: [175]-[178].

Insurance: Liability Insurance

***Zurich Australian Insurance Limited v CIMIC Group Limited & Ors* [2024] NSWCA 229**

Decision date: 18 September 2024

White and Stern JJA, Griffiths AJA

These appeals arise out of a dispute between CIMIC Group Limited (CIMIC), formerly Leighton Holdings Limited (Leighton), and its tower of Directors' and Officers' Liability and Company Security insurers for the financial year commencing 30 June 2011. CIMIC bid for a large infrastructure project known as the Iraq Phase 1 Project. In 2010 Mr Stewart, a senior officer made file note suggesting that there was corruption involved with the bid (the Iraqi File Note). CIMIC did not make any notification of the matters identified in the Iraq File Note, or of a possible loss, to the 2010 Insurers, nor make any claim under the 2010 Policies. CIMIC also obtained 2011 directors and officers insurance without disclosing the existence of the Iraqi File Note or its contents.

The Iraq File Note was discovered by CIMIC's external solicitors and on 7 November 2011, CIMIC referred the Iraq File Note to the Australian Federal Police (AFP). CIMIC subsequently claimed various losses under the 2011 Policies, including in relation to the AFP investigation, separate ASIC investigations, and costs incurred in connection with the investigation, defence and settlement of various representative proceedings arising out of an alleged failure to disclose the Iraq File Note. CIMIC brought proceedings against both the 2010 and 2011 Insurers. The primary judge declared that the 2011 insurers were not liable to indemnify CIMIC for the costs of the representative proceedings but were severally liable to indemnify CIMIC for the investigation costs, and also made declarations against the 2010 insurers.

The Court held (White JA, Stern JA and Griffiths AJA), allowing the Zurich Appeal in part, allowing the Berkley Appeal and the Arch/Dual Appeal, dismissing the Chubb Appeal, dismissing each of CIMIC's cross-appeals and dismissing AIG's cross-appeal:

- There was no error in the primary judge's finding that the 2011 Insurers should succeed in their defence relying upon s 21 of the *Insurance Contracts Act 1984* (Cth) and that the primary judge did not err in finding that CIMIC made an actionable misrepresentation: [150]-[151].
- An omission to form an expectation that a claim would arise from the circumstances of the Iraq File Note is not a relevant omission for which relief is available under s 54. Thus, the Court found that the primary judge erred in ordering contribution from Berkley in respect of AIG's liability for various Investigation Costs: [425]-[427].
- The Court held that the primary judge erred in making the 2010 Declaration, finding that in the particular circumstances, the Court lacked jurisdiction to do so and if (to the contrary) the Court had jurisdiction to grant some form of declaratory relief, the exercise of that discretion miscarried: [428].

Australian Intermediate Appellate Decision of Interest

Contract: Breach

***Dar-Alawda (Wendel Street) Community Centre Inc v Merri-Bek City Council* [2024] VSCA 214**

Decision date: 19 September 2024

Emerton P, Macaulay and Lyons JJA

Dar-Alawda (Wendel Street) Community Centre Inc (the Community Centre) is a not-for-profit incorporated association, whose objectives include the maintenance of community services networks for Victorian families. The Community Centre purchased an undeveloped patch of land at less than market value (Montford Park). Three principal documents contained key terms relating to sale of the property. First, a sales contract (the Contract) which incorporated an agreement by the Community Centre to improve Montfort Park by constructing a basketball court, and to provide access to Montfort Park to local residents (Special Conditions). Second, an agreement under s 173 of the *Planning and Environment Act 1987* (s 173 Agreement), annexed to the Contract. Third, a deed of option to purchase, enabling the Council to buy back the property if the applicant breached the Special Conditions under the Contract. The Council sought to buy back the property. At first instance, the primary judge concluded that the Community Centre breached two terms of the Special Conditions comprising part of the obligation not to prevent or impede access by local residents to Montfort Park.

The Court held (joint judgment of Emerton P, Macaulay and Lyons JJA), dismissing the appeal:

- While the principal document that governs the relationship between the Community Centre and the Council in relation to Montfort Park and Open Space memberships was the Contract, many of the annexures to the Contract are also significant given that they were negotiated between the Community Centre and the Council before entering into the Contract. The primary judge did not err in determining that the Community Centre breached the contract special condition and the s 173 Agreement, requiring the Community Centre to process applications for membership to the association with due diligence so as not to impede access to members of the local community: [88]-[103].
- The primary judge had not erred in finding a notice of default was valid. A reasonable person in the shoes of the Community Centre would understand that the default notice asserted two separate breaches of the display term, as the judge concluded: [122].
- The primary judge had made no *House v The King* (1936) 55 CLR 499 error in determining that the Community Centre was not entitled to relief against forfeiture: [141]-[149].

Asia Pacific Decision of Interest

Class Action: Commercial Law

***Cridge v Studorp Limited* [2024] NZCA 483**

Decision date: 26 September 2024

French, Brown and Gilbert JJ

From 1987 until 2005 James Hardie manufactured and sold a sheet cladding system called Harditex for use in residential houses. A group of homeowners whose houses were built using Harditex claimed that Harditex was an inherently defective product that was not fit for purpose. They further claimed it had either caused or contributed to cause their homes to suffer water ingress and moisture-related damage. The claim pleaded causes of action under ss 9 and 10 of the *Fair Trading Act 1986* (NZ) and sought to hold James Hardie liable in damages. In the High Court, France J held that James Hardie owed a duty of care to the homeowners, however in all other respects his Honour rejected their claim. The primary judge accepted that the test properties were water damaged and should not be and concluded that the cause of the damage to the test properties was more likely to be incompetent building and poor texture coating than inherent defects associated with Harditex.

The Court held (joint judgment of French, Brown and Gilbert JJ), dismissing the appeal:

- After conducting the two-stage policy and proximity inquiry required when considering if it would be just, fair and reasonable to recognise a novel duty, the Court concluded the primary judge was correct to find that James Hardie owed a duty of care to the homeowners: [36]-[84].
- James Hardie did not breach their duty of care nor ss 9 and 10 of the *Fair Trading Act 1986* (NZ). At least by 1991, the target audience of James Hardie's technical literature (JHTIs) were designers and builders who had a good knowledge of the building industry and were capable of reading the relevant James Hardie's technical literature as a whole. One possible misleading statement could not give rise to a breach of ss 9 and 10 because there was not a sufficient causal nexus and claims based on the JHTIs were time-barred: [444]-[445].
- All claims under the *Fair Trading Act 1986* (NZ) — aside from possibly those where the relevant JHTI was one of the 1998 versions — were time-barred. For the purposes of s 4 of the *Limitation Act 1950* the cause of action accrued when the damage was reasonably discoverable. It noted that although the long-stop provisions in the Building Act did not apply to the homeowners' claims, s 23B of the *Limitation Act 1950* (a 15-year longstop provision) did apply. This appeared to mean that — given the proceedings were filed in August and October 2015 — at best for the homeowners, only claims about properties built after August or October 2000 would likely be in time: [464].

International Decision of Interest

Constitutional Law: Republic of Trinidad and Tobago

Terrisa Dhoray v Attorney General of Trinidad and Tobago and another **[2024] UKPC 28**

Decision date: 16 September 2024

Lord Reed, Lord Lloyd-Jones, Lord Burrows, Lord Stephens, Lady Simler

The Trinidad and Tobago Revenue Authority Act, Act No 17 of 2021 (the Act) was passed by the Parliament of Trinidad and Tobago by a simple majority in 2021. The Act created a new body corporate, the Trinidad and Tobago Revenue Authority (the Authority). The Act also transferred to the Authority, the functions of assessing and collecting tax, administering and enforcing the revenue laws, and enforcing border control measures. Those functions had previously been performed by public officers in divisions in the Ministry of Finance. Ms Terrisa Dhoray is one such public officer. The appointment and tenure of public officers is governed by Chapter 9 of the Constitution of Trinidad and Tobago (the Constitution). Not all employees of the Authority are public officers. Ms Dhoray sought declarations that the Act was inconsistent with the Constitution on the basis that it: (i) vests in the Minister of Finance and Authority the power of appointment, removal and disciplinary control over public officers; or (ii) devolves the performance of functions of the Government to persons who are not public officers.

The Court held (Lady Simler, Lord Reed Lord Lloyd-Jones, Lord Burrows and Lord Stephens agreeing), dismissing the appeal:

- The correct approach is to focus on the rationale or purpose of Chapter 9 of the Constitution, and the protections for public officers which it contains, in order to determine whether devolving tax functions to the Authority contradicts its terms or the assumptions on which it is based: [70]
- Since the rationale of Chapter 9 is to protect public officers and indirectly the public from improper political pressure by virtue of the fact that public officers are institutionally part of government, if the function performed by such officers is removed from government and put into the hands of a separate statutory body, there is no longer any need for those protections, provided that two conditions are satisfied. First, the separate statutory body must be genuinely independent and not a device or a sham. Secondly, there must be adequate and effective safeguards to ensure that there is in fact independence and sufficient protection for employees from political interference from the executive: [76]
- There is no suggestion that the creation of the Authority was a device or a sham, and there are effective safeguards to protect the staff and officers of the Authority and members of the public from executive interference. Accordingly, the Act is not inconsistent with the Constitution: [77]-[84].