Court of Appeal
Supreme Court
Sydney

Decisions of Interest

15 April 2024 – 6 May 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

Representative proceedings: Conflicts of interest

David William Pallas & Julie Ann Pallas as trustees for the Pallas Family Superannuation Fund v Lendlease Corporation Ltd **[2024] NSWCA 83**

Decision date: 17 April 2024

Bell CJ, Ward P, Gleeson, Leeming and Stern JJA

In shareholder class action proceedings, a separate question was stated and removed to the Court of Appeal by Ball J. In short, the question was two-part:

> (1) Is the decision in *Wigmans v AMP Ltd* (2020) 102 NSWLR 199 "plainly wrong" in light of *Parkin v Boral Ltd* (2022) 291 FCR 116?
>
> (2) Does the Supreme Court have the power pursuant to sections 175(1), 175(5) and 176(1) to approve a notice that has the effect of excluding un-registered, non-opted-out parties from seeking the benefit of any potential future settlement?

The Court held (Bell CJ, Gleeson, Leeming and Stern JJA agreeing, Ward P dissenting but agreeing with respect to the orders), answering the questions in the negative:

- The reasons advanced in *Parkin* leading to the conclusion that *Wigmans* was "plainly wrong" were not sufficiently persuasive as to justify that conclusion in the Court of Appeal. Its reasoning was underpinned by earlier decisions of the Court of Appeal and the High Court, and there is no reason to depart from a closely reasoned decision: [59]-[76], [94]-[123] (Bell CJ); [138]-[139] (Gleeson JA); [139], [159] (Leeming JA); [160] (Stern JA).
- Providing the proposed notification to group members would promote a conflict of interest for the representative party who would be constrained to participate in any mediation on the basis that registered group members would share in compensation obtained through settlement; but unregistered group members would not only not obtain any benefit from settlement, but would be likely to have their causes of action extinguished. Ward P, differing in emphasis, said such conflicts would arise only upon application to the court to exclude the unregistered group members: [106]-[117] (Bell CJ); [138] (Gleeson JA); [139] (Leeming JA); [160] (Stern JA); cf [128]-[136] (Ward P).
- Section 175(6) of the CPA constrains s 175(5) in two respects: first, the notice must relate to an "event", second, that is not a future event but rather, an event that has "happened". The proposed notification is not of any event. It is of a present intention on the part of Lendlease and perhaps the representative plaintiff to participate in settlement negotiations in a particular way: [32], [112], [118]-[119] (Bell CJ), [138] (Gleeson JA), [139] (Leeming JA), [160] (Stern JA); cf [137] (Ward P).

Contracts: Formation

Douglas v Mikhael **[2024] NSWCA 89**

Decision date: 24 April 2024

Ward P, Mitchelmore JA, and Basten AJA

This appeal concerned two alleged oral contracts, the first allegedly entered into in November 1999 between Mr Douglas (Appellant), Mr Mikhael and Ms Karborani (together, Respondents) (First Agreement). Under the First Agreement, Mr Douglas alleged that he would pay $75,000 to the Respondents to acquire businesses to be managed under a franchise agreement from a franchisor. These businesses were to be held on trust, and the trustee would hold 50% of its interest in each business for the benefit of the Appellant.

Mr Douglas also alleged that another agreement had been reached in May 2015 pursuant to which the Respondents would pay the Appellant $1,450,000, in consideration for him releasing the trustee from his claim for 50% of the profits for the period up to 30 April 2015 (Second Agreement). The Respondents disputed the existence of both agreements.

The primary judge dismissed the Appellant's claim, who then appealed from the factual findings rejecting the existence of the alleged First Agreement.

The Court held (Ward P, Mitchelmore JA, and Basten AJA), dismissing the appeal with costs:

- No error was demonstrated in the primary judge's conclusion that it was implausible for Mr Douglas to have a precise recollection of the date of the conversation relevant to the First Agreement, given the absence of any contemporaneous note. The reason for the absence of a written record is immaterial to the difficulty of relying upon memory without any contemporaneous record. In any event, the primary judge did not err in finding that Mr Douglas' explanation for his precise recollection was not credible: [81]-[82], [92].
- There was no error in the primary judge having had regard to whether there was post-contractual conduct to corroborate whether the agreement was entered into: [112]-[113].
- In light of the failure to establish error in respect of various factual findings, there was no error in the primary judge's conclusion that there was no November 1999 Agreement: [147].
- There was no excessive questioning or interference by the primary judge, nor was the primary judge suggesting lines of cross-examination to the respondents' counsel. The allegations of a denial of procedural fairness or the apprehension of bias were not made good: [106]-[107].

Leases: Construction

***United Petroleum Pty Ltd v Coastal Service Centres Pty Ltd* [2024] NSWCA 97**

Decision date: 3 May 2024

White, Harrison JJA, Basten AJA

In July 2018 the appellant, United Petroleum Pty Ltd (United), operated a service station at "The Rock Roadhouse" on the Pacific Highway at North Arm Cove. The previous owner of the property had entered into a lease with United, which had commenced on 1 July 2016. On 31 July 2018, a fire destroyed the buildings, but not the fuel pumps and tanks.

On 31 May 2018 the respondent, Coastal Service Centres Pty Ltd (Coastal), had entered into a contract to buy the property, subject to various leases, including the lease to United. Following the fire and further negotiations, the sale settled on 20 June 2019. Pursuant to cl 8.2.3 of the lease, Coastal was entitled to serve on United a notice if satisfied that the fire damage made repairs "impracticable or undesirable", with the effect that Coastal could then terminate the lease on 14 days' notice. On 18 January 2022, Coastal served a cl 8.2.3 notice.

The issue on appeal was whether the cl 8.2.3 notice was served by Coastal (i) within a reasonable time; (ii) acting reasonably; and (iii) acting in good faith.

The Court held (Basten AJA, White and Harrison JJA agreeing), dismissing the appeal:

- (i) The cl 8.2.3 notice needed to be served within a reasonable period which ran from the event causing damage to the property. The lease then required the damage to be assessed within a reasonable time, whose occurrence was not disproved by United. Activities undertaken by Coastal from June 2019 to November 2021 were steps which it was reasonable to undertake in order to make a firm decision as to whether rebuilding should proceed. The focus must be on reaching a state of mind; not merely considering the issues: [37]-[40], [45]-[48].
- (ii) The terms of cl 8.2.3 did not invoke a standard of objective reasonableness, but rather the exercise of a power in good faith based upon the subjective belief of the lessor. Although there are cases which require a principal asserting a breach of contract to act reasonably, as well as in good faith, that element will turn on the proper construction of the contract and not an implied condition imposed by law. The reasoning is not transferable to non-breach cases; nor is it necessary to imply a constraint to prevent a principal acting on trivial or insignificant breaches. No different conclusion is required by the lease cases: : [56], [86]-[88], [95], [97]-[106].
- (iii) The lessor was not required to take the lessee's interests into account, nor was it required to engage in an analysis of building costs and rental income that utilised the best information in hindsight but rather to conduct an analysis that was rational and genuine at the time of consideration: [102], [104], [105], [111], [127]-[128], [144].

Australian Intermediate Appellate Decisions of Interest

Equity: Specific performance

Parwan Investments Pty Ltd v Hooper **[2024] VSCA 86**

Decision date: 6 May 2024

McLeish, Walker and Macaulay JJA

Hooper and Parwan entered into a contract of sale for land on 21 October 2016 (Contract). The Contract required that Parwan use its best endeavours to obtain the registration of a plan of subdivision by 21 April 2018 (Plan), and specified that settlement was to take place on the later of 21 March 2018 or 14 days after notice to Hooper of the registration of the Plan. Hooper had the right to terminate the contract if a Plan was not registered by 21 April 2018, but – when this date passed – elected not to do so; the contract therefore remained on foot. During this time, Hooper was in possession of the land pursuant to a lease

Ten months before the Contract, the Commonwealth Bank of Australia (Bank) registered a mortgage over the land securing a loan advanced to Parwan. The Contract placed Parwan in breach of the mortgage, who then subsequently defaulted. The Bank appointed receivers to sell the land, and Hooper issued proceedings against Parwan claiming an order for specific performance of the contract of sale.

The primary judge held that the contract for sale was not specifically performable. This was reversed by a single appellate judge.

The Court held (McLeish, Walker and Macaulay JJA), granting leave to appeal and allowing the appeal:

- The ultimate question to be answered is whether there is a real, as opposed to a fanciful, prospect that, at the trial of this proceeding, the court will order that Parwan, through the receivers, specifically perform the contract of sale. In the present case, an order for specific performance in the strict sense would be an order that Parwan execute and deliver to Hooper a transfer of the subdivided portion of the land. This, in turn, rests on the performance of a number of other promises made by Parwan under the contract of sale, such as the use of best endeavours in the preparation and registration of a Plan, and critically, provide an executed discharge of the mortgage over land: [66]-[70].
- In circumstances where Parwan could not show that the Bank would consent to the sale, which it was not obliged to do, after a subdivision that Parwan did not appear to want to actively pursue, the prospects that a court will order the Contract to be specifically performed appear fanciful and artificial. In any event, the Court considered that the Bank would not give such consent: [77]-[81].

Judicial Review: Procedural Fairness

Queensland Racing Integrity Commission v Endresz; Racing Queensland Board v Endresz **[2024] QCA 76**

Decision date: 7 May 2024

Morrison JA, Fraser AJA and Williams J

The Racing Queensland Board and the Queensland Racing Integrity Commission (Commission) appealed against a declaration ordered by the primary judge in favour of the owners of a racehorse that the disqualification by the Commission of the horse from its first placing in a race is void and of no effect.

In brief, a gelding named Alligator Blood entered, and won, Race 6 at a race meet at the Gold Coast on 11 January 2020. The prize money payable to the syndicate of owners was almost $1,000,000. This money was not paid out following the detection of a prohibited substance in a urine sample taken from Alligator Blood.

The trainer of the horse was subsequently charged and fined, and the prize money was not paid out to the syndicate. However, the owners were not given any formal notice of the stewards' inquiry or the hearing of the charge into the trainer, let alone afforded an opportunity to be heard by the stewards. The hearing was conducted in accordance with the uniform Australian Rules of Racing (AR), which, by virtue of its public character, attracted the requirement of affording natural justice to impugned parties. Accordingly, the primary judge held that the lack of notice given to the owners was in breach of the natural justice requirement, and nullified the orders given by stewards.

The Court held (Morrison JA, Fraser AJA and Williams J), dismissing the appeal:

- There is a well-known distinction between the existence of an obligation to observe the principles of natural justice and the content of those principles. The principles are flexible and context-dependant. Naturally, the content of those principles in a hearing conducted by racing stewards is less sophisticated than what would be required in a judicial hearing. The right to natural justice may therefore be fulfilled in an informal fashion: [53].
- Despite the multifaceted roles of racing stewards, insofar as they are vested with the functional equivalent of many roles separately performed in the criminal justice system, there is no basis to conclude that the owners are not at least entitled to notice of hearing and an opportunity to be heard: [53].
- Whether the requirement of natural justice is excluded is understood through the proper construction of the AR in the circumstances in which the relevant rules apply, noting Campbell J's observations in *McClelland v Burning Palms Surf Life Saving Club* that while preferable to construe rules on the basis that fair procedures are intended, there is a possibility that express words or necessary implication could exclude natural justice in whole or part: [54].
- In the circumstances, the appropriate conclusion is that the AR confer upon the owners an entitlement to natural justice: [69].

Asia Pacific Decision of Interest

Novel duty of care

Tasman District Council v Louise Buchanan, Keith Marshall and Alistair Donald as Trustees of the Buchanan Marshall Family Trust **[2023] NZCA 133**

Decision date: 26 April 2024

Goddard, Mallon and Wylie JJ

In 2004 the Tasman District Council (Council) granted building consent for an architecturally designed home oriented around a swimming pool set in a central courtyard. An inspection was undertaken in 2004, and a code compliance certificate (CCC) was issued by the Council in 2006; and in 2008 Ms Louise Buchanan and Mr Keith Marshall purchased the property (the owners). They purchased the property in reliance on the assurances provided by the CCC.

In 2009 and 2012, the Council confirmed the pool was compliant with the *Fencing of Swimming Pools Act 1987* (NZ). It was discovered however in 2019, when the owners tried to sell the property, that the pool was non-compliant. The owners undertook the required remedial work, and in doing so impaired the value of the property.

In 2020 the owners brought proceedings against the Council in tort, claiming that the 2009 and 2012 inspections had been negligent, and because of that negligence they had lost the opportunity to sue the Council in respect of its earlier negligence in 2004 and 2006 (by reason of a limitation period). The High Court ordered accordingly, and the Council appealed to the Court of Appeal.

The Court held (Goddard, Mallon and Wylie JJ), allowing the appeal:

- The owners could not establish the fourth limb of the test of negligent misstatement, namely they did not act on the inspections by making a decision not to initiate proceedings against the Council before the time-bar expired. The owners were not contemplating bringing proceedings at the time, nor was the Council aware that its inspections were being relied upon to assist the owners to make decisions about the claims: [94]-[99].
- The owners failed to establish the requisite proximity between them and the Council in regard to the 2009 and 2012 inspections to ground a claim in negligence. The Council did not owe the owners a duty of care to protect the owners from loss of rights of action against the Council when it carries out the inspections and advised the owners of their outcome: [115].
- The *Limitation Act 1950* (NZ) applies to a claim based on the 2009 inspection. Given the loss suffered did not arise until 2016 at the earliest, the six-year limitation period in that Act had not expired when the owners filed claim in 2020. However, the *Limitation Act 2010* (NZ) bars the claim based on the 2012 inspection: [55]-[56].

International Decision of Interest

Constitution: Cause of action

***DeVillier v Texas*, 601 U.S. 285 (2024)**

Decision date: 16 April 2024

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

Robert DeVillier and more than 120 other petitioners own property north of US Interstate Highway 10 (I-10) between Houston and Beaumont, Texas. A dispute arose after the State of Texas (State) took action to use portions of I-10 as a flood evacuation route, installing a 3-foot-tall barrier along the highway median to act as a dam. The barrier performed as intended, but it also flooded the petitioners' land to the north, causing significant damage to their properties.

DeVillier filed suit in Texas state court, alleging that by building the median barrier and using his property to store stormwater, Texas had affected a taking of his property for which it must pay just compensation pursuant to the Takings Clause of the Fifth Amendment. Texas moved to dismiss the federal inverse-condemnation claim, arguing that a plaintiff has no cause of action arising directly under the Takings Clause. The District Court denied Texas' motion, concluding that a property owner may sue a State directly under the Takings Clause. The Fifth Circuit reversed the decision of the District Court.

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

- The Court has previously explained that a "property owner acquires an irrevocable right to just compensation immediately upon a taking"… "because of the 'self-executing character' of the Takings Clause 'with respect to compensation'". However, that does not necessarily mean that the Takings Clause is itself the procedural vehicle by which a property owner may seek to vindicate that right. Constitutional rights do not typically come with a built-in cause of action to allow for private enforcement in courts, and so they are asserted offensively pursuant to an independent cause of action designed for that purpose.
- DeVillier's reliance on the *First English* case and others is ineffective given they do not directly confront whether the Takings Clause provides a cause of action by its own force.
- However, Texas state law does provide an inverse-condemnation cause of action by which property owners may seek just compensation against the State based on both the Texas Constitution and the Takings Clause in the Federal Constitution. The action should therefore be brought under Texas law.