Decisions of Interest

15 November 2024 – 29 November 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

Civil procedure: extension of time previously granted for statute-barred claim

Commonwealth of Australia v Winston **[2024] NSWCA 277**

Decision date: 28 November 2024

Gleeson, Leeming and Adamson JJA

In June 1969, the USS Frank E Evans collided with the HMAS Melbourne during a joint training exercise in the South China Sea. Mr Winston was on board HMAS Melbourne, serving as a member of the Royal Australian Navy. In 2019, Mr Winston filed a statement of claim against the Commonwealth claiming damages for personal injuries as a consequence of the collision. The particulars of negligence in that statement of claim primarily concerned the conduct of the officers of the HMAS Melbourne in the minutes immediately preceding the collision, including the quality of the warning signals and the transmission of messages, which had been investigated in contemporaneous reports. In 2021, Harrison CJ at CL granted an extension of the limitation period for that claim. In 2023, Mr Winston sought leave to file a further amended statement of claim which made further allegations that were not mentioned in the original statement of claim. Schmidt AJ granted Mr Winston leave to make those amendments. On appeal, the Commonwealth argued that leave could not have been granted under s 65(2)(c) of the *Civil Procedure Act 2005* (NSW) because the further amended statement of claim raised a "new cause of action" which did not arise "from the same (or substantially the same) facts" as those supporting the original cause of action. The Commonwealth also argued that a further extension of time should not be granted.

The Court held (Leeming JA, Gleeson JA and Adamson JA agreeing), allowing the appeal:

- The amended statement of claim included allegations that were qualitatively different from the navigational failures which the original statement of claim alleged. In particular, the new claim was that the Commonwealth was vicariously liable for the tortious conduct of an officer not mentioned in the original pleadings, the particulars of breach relate to a period quite different to the original claim and relate to the positioning of the ships and the planning of the exercise rather than the conduct of officers in the minutes immediately preceding collision. For those reasons, the new statement of claim did not plead a cause of action arising out of the same or substantially the same facts for the purposes of s 65(2)(c): [148]-[157], [191].
- The prejudice to the Commonwealth means that an extension of the limitation period should not be granted. Events mentioned in the new statement of claim were not the subject of investigations or findings in contemporaneous reports: [172]-[182], [192].

Land law: whether condition of by-law that exclusive use rights cease unless obligations complied with were unjust

***Owners Corporation SP6534 v Elkhouri; Owners Corporation SP6534 v Perpetual Corporate Trust Ltd* [2024] NSWCA 279**

Decision date: 27 November 2024

Ward P, McHugh JA and Griffiths AJA

The appellant was the owners corporation for a strata title apartment building (the Owners Corporation). The registered proprietor of Lot 11 of the apartment was Mr Said Elkhouri (Mr Elkhouri), who died in 2019. The executors of Mr Elkhouri's estate, Messrs Karam and Philippe Elkhouri (together, the Executors), were the first and second respondents. Mr Elkhouri and the Owners Corporation had various claims against each other. These were resolved by a deed of settlement, which provided for the Owners Corporation to pass a new by-law. This became by-law 30, which granted the owner of Lot 11 the right of exclusive use and enjoyment of certain parts of the common property, being the level 5 and level 6 balconies and rooftop spaces. Paragraph 30.3 made the continuation of the exclusive use rights after 23 May 2018 (Sunset Date) conditional on the owner of Lot 11 completing certain work in the exclusive use areas by the Sunset Date. The Owners Corporation appealed the primary judge's declaration that paragraph 30.3 was "unjust" within the meaning of s 149(1)(c) of the *Strata Schemes Management Act 2015* (NSW) (SSMA) and the Executors cross-appealed on the primary judges findings that the appellant was entitled to various sums of money in damages.

The Court held (McHugh JA, Ward P and Griffiths AJA agreeing), substantially allowing the appeal and in part allowing the cross-appeal:

- The jurisdiction of the Supreme Court in matters in which a declaration was sought was wide. Where a statute confers on a tribunal the function of making a finding, the correct approach was to ask whether the statute clearly withdrew the determination of that question from the jurisdiction of the Supreme Court. Section 149(1) of the SSMA did not do so: [79]-[85] (McHugh JA).
- Paragraph 30.3 was not unjust within the meaning of s 149(1)(c) of the SSMA. The grant of rights under by-law 30 was limited in nature and scope. There was nothing unjust in granting a right only upon the satisfaction of certain reasonable conditions: [193], [200]-[201] (McHugh JA).
- In relation to the cross-appeal, in order to establish the Owners Corporation's entitlement to recover under the provisions of par 30.7 on which it relied, it was necessary to identify defects and connect them with the costs or liabilities claimed. The primary judge erred in upholding and quantifying the Owners Corporation's economic claims without making the necessary findings: [239], [240], [255], [256] (McHugh JA).
- The primary judge's orders awarding amounts in favour of the Owners Corporation were set aside in part and the claims were referred to a referee: [257], [266] (McHugh JA), [1] (Ward P), [338] (Griffiths AJA).

Private international law: exclusive jurisdiction clause

***HNOE Limited v Angus & Julia Stone Pty Ltd* [2024] NSWCA 271**

Decision date: 19 November 2024

Bell CJ, Leeming and Payne JJA

On 14 August 2015, Angus Stone, Julia Stone and "Angus & Julia Stone Pty Ltd" (the Stones) entered into an agreement (the Management Agreement) with HNOE Limited (HNOE). The Management Agreement provided that: HNOE would be the Stones' manager; that the Stones would make commission payments to HNOE; and that HNOE would ensure that Tim Manton would provide management services to the Stones. Clause 12.11 of the Management Agreement provided that "…this agreement shall be subject to English Law and the High Court of Justice, Strand, London shall be the sole court of competent jurisdiction". Earlier, on 4 October 2013, HNOE and Manton Music Management Pty Ltd (MMM), entered into an agreement (the MMM Agreement) whereby MMM undertook for Mr Manton (MMM's sole director) to provide management services to the Stones in return for 50% of commission payments received by HNOE from the Stones. Neither Mr Manton nor MMM were parties to the Management Agreement. The Stones commenced proceedings against HNOE, MMM and Mr Manton (the Defendants) seeking compensation for, or restitution of previous commission payments said to have been charged in breach of the Management Agreement and the *Entertainment Industry Act 2013* (NSW). The Defendants applied summarily to dismiss and stay the Plaintiffs' claims for breach of statutory duty and restitution. The primary judge characterised cl 12.11 as an exclusive jurisdiction clause but refused summarily to dismiss or stay proceedings.

The Court held (Bell CJ, Leeming and Payne JJA agreeing), substantially allowing the appeal and in part allowed the cross-appeal, holding:

- In the circumstances of the case, the primary judge should have found that the *Entertainment Industry Act 2013* (NSW) did not give rise to a free-standing cause of action for breach of statutory duty and there was utility in reaching this decision: [72]-[81], [86]-[87].
- While MMM and Mr Manton were not parties to the exclusive jurisdiction clause, they were not "members of an undifferentiated group of non-parties" the existence of whom provided strong reasons for not giving effect to the exclusive jurisdiction clause: [109]-[112].
- The Court re-exercised its discretion, and stayed the proceedings, noting that "as between the Stones and HNOE, the disputes are governed by the exclusive jurisdiction clause and prima facie must be heard in accordance with the parties' contractual agreement. That being so, and bearing in mind the very close and interconnected relationship between those disputes and the claims in restitution brought against MMM and Mr Manton, New South Wales would be a clearly inappropriate forum in which to determine such closely related claims": [105]-[116].

Contracts: right of rescission

***Kane & Co (NSW) Pty Ltd v Idolbox Pty Ltd* [2024] NSWCA 278**

Decision date: 27 November 2024

Kirk and McHugh JJA and Basten AJA

On 24 November 2022, the appellant entered into a contract with the first respondent for the purchase of land in Randwick which was used as a service station and automotive workshop. Special Condition 22 (SC 22) of the contract gave a right to rescind if an "Environmental Report" which was to be obtained "indicates that the property does not fall within the NSW Environment Protection Authority guidelines in relation to the contamination levels in, on or under the property and which permits the property to be used as a Service Station" (sic). The relevant guidelines were the "Consultants reporting on contaminated land: Contaminated Land Guidelines" gazetted on 3 April 2020 (EPA Guidelines), which incorporated the *National Environment Protection (Assessment of Site Contamination) Measure 1999* (Measure). The Environmental Report indicated that certain contaminants exceeded the levels specified by the EPA Guidelines for use of the land as a service station. The report did not indicate that the contamination levels were such that the land could not be used as a service station. On 20 February 2023, the appellant purported to rescind the contract in reliance on SC 22. The first respondent disputed that the right of rescission had been engaged. The primary judge found that the right to rescind had not been engaged. The appellant appealed on the question of construction.

The Court held (McHugh JA, Kirk JA and Basten AJA agreeing) allowing the appeal:

- The EPA Guidelines provide for general processes for the assessment of contamination. They specify levels of contaminants by reference to categories of use of land. The EPA Guidelines do not themselves permit or prohibit the use of land. However, if the contamination levels for a category of land use are not exceeded, under the EPA Guidelines no further action was required. In that practical sense, the EPA Guidelines permit the use:[49]-[51],[62] (McHugh JA).
- The correct construction of SC 22 was that the right to rescind was engaged if the Environmental Report indicates that the contamination levels at the property exceed those specified by the EPA Guidelines. The words, "and which permit[] the property to be used as a Service Station", identify the relevant land use (being a commercial/industrial use) for the purpose of determining the applicable levels: [56]-[62], [77] (McHugh JA).
- It was the "falling within" the thresholds fixed by the guidelines which permits continued use as a service station; it was the "not falling within" those thresholds which engages the right to rescind. Falling within (that was below) the threshold does not of itself permit the use of the property as a service station. However, it does permit the existing use to continue without the obligation to notify the EPA of the contamination, accompanied by the risk that the EPA will take steps to impose regulatory controls: [103], [104] (Basten AJA).

Australian Intermediate Appellate Decision of Interest

Trade marks: where registered trade mark is a name

***Killer Queen, LLC v Taylor* [2024] FCAFC 149**

Decision date: 22 November 2024

Yates, Burley and Rofe JJ

The respondent, Katie Jane Taylor, was the registered owner of an Australian trade mark for the word KATIE PERRY which was registered in class 25 for "clothes" with a priority date of 29 September 2008. Ms Taylor had designed and sold clothes under the brand name "KATIE PERRY" since 2007. The appellant, Katheryn Hudson, a music artist and performer, adopted the name Katy Perry in 2002, for the purposes of her professional music career and associated commercial merchandise licensing activities. Ms Taylor alleged Ms Hudson, and her associated companies Killer Queen, LLC, Kitty Purry, Inc and Purrfect Ventures, LLC infringed the KATIE PERRY trade mark pursuant to s 120 of the *Trade Marks Act 1995* (Cth) and were liable as joint tortfeasors. Ms Hudson filed a cross-claim seeking cancellation of Ms Taylor's trade mark. At first instance, Ms Hudson and Kitty Purry were found to have infringed Ms Taylor's trade mark. Ms Hudson appealed. In turn, Ms Taylor cross-appealed in relation to the primary judge's findings that Ms Hudson, Kitty Purry and Killer Queen were not liable as joint tortfeasors.

The Court held (joint judgment of Yates, Burley and Rofe JJ), allowing the appeal in part and allowing the cross-appeal in part:

- Ms Hudson was a joint tortfeasor with Kitty Purry. Each of the acts of Kitty Purry were acts that could only come about by the agency of Ms Hudson, who was the sole director, shareholder, CEO and CFO of Kitty Purry. There was no dispute that Kitty Purry was the alter ego of Ms Hudson: [108]-[119].
- Killer Queen was not a joint tortfeasor. There was no evidence that it played any active role in the commission of the tort. Its role was simply as the licensor of the Katy Perry Mark: [120].
- It was the obligation of the trade mark owner to clearly specify the goods in respect of which the trade mark was to be registered and thereby define the scope of the monopoly they claim. As Ms Taylor did not nominate headgear or footwear in her trade mark specification, primacy must be given to the words actually chosen by the trade mark owner to delimit the scope of the monopoly they claim: [43]-[60].
- The primary judge ignored the common practice of pop stars to sell merchandise including clothing at concerts and to launch their own clothing labels. The ordinary consumer with an imperfect recollection of the Katy Perry trade mark confronted with a garment with Ms Taylor's Mark on it would be likely to be confused as to the source of the item and wonder whether it was associated with Ms Hudson. As a result, the Register should be rectified by cancelling the Mark: [291]-[300].

Asia Pacific Decision of Interest

Private international law: anti-suit and anti-enforcement injunctions

***Wikeley v Kea Investments Limited* [2024] NZCA 609**

Decision date: 21 November 2024

Courtney, Muir and Cull JJ

Mr Wikeley and his associates obtained a default judgment (the Kentucky Default Judgment) against Kea for approximately USD 130 million in the Kentucky Circuit Court based on an asserted contract between Kea and the Wikeley Family Trust (the Coal Agreement). Kea said that the Kentucky Default Judgment was obtained by fraud as part of a global fraud instigated by Mr Eric Watson. In proceedings brought in New Zealand, Kea alleged conspiracy against Mr Wikeley, Wikeley Family Trustee Ltd and Mr Watson. It sought anti-suit and anti-enforcement injunctions to restrain Mr Wikeley from enforcing the judgment. Gault J found that the Coal Agreement was a forgery and the Kentucky Default Judgment had been obtained by fraud. The injunctions sought by Kea were granted. Mr Wikeley appealed on the basis that the New Zealand High Court (the Court) lacked jurisdiction to grant the injunctions, that the injunctions were contrary to international comity and challenged the Court's finding of forgery and fraud.

The Court held (Courtney, Muir and Cull JJ agreeing), allowing the appeal in part:

- The Court had jurisdiction. Kea's claim concerned at least two parties who were not parties to the Kentucky proceedings. Either the most significant elements of the conspiracy took part in New Zealand or the general rule in s 8 of the *Private International Law (Choice of Law in Tort) Act* was appropriately displaced. The location of parties and witnesses did not favour Kentucky. In any event, the forum conveniens implications of a trial in New Zealand were limited because of the substantive similarities between the applicable New Zealand, Kentucky and Federal United States law: [147]-[159].
- It was not appropriate in international comity terms to grant the anti-suit and anti-enforcement injunctions. International comity requires that a New Zealand court should be extremely cautious before deciding that there was a sufficiently real risk that justice will not be done by a foreign court to warrant imposition of anti-suit and/or anti-enforcement injunctions. They are measures of last resort. In this case, Kea applied to the Court because of the apparent unwillingness of the Kentucky Circuit Court to intervene and its concern that the Kentucky Court of Appeals would apply a deferential standard of appellate review: [184]-[201].
- The orders made by the Court, including the appointment of interim liquidators to the Wikeley Family Trust and the declaration that the Kentucky Default Judgment was obtained by fraud should be upheld: [196], [211].

International Decision of Interest

Contracts: trade union subscriptions

Secretary of State for the Department for Environment, Food and Rural Affairs (Respondent) v Public and Commercial Services Union (Appellant) **[2024] UKSC 41**

Decision date: 20 November 2024

Lord Reed, Lord Sales, Lord Burrows, Lady Rose, Lady Simler

The employees are members of the appellant trade union, the Public and Commercial Services Union (PCS). They paid their trade union subscriptions by means of "check-off arrangements" whereby the subscriptions were deducted directly from their salaries through the payroll system and then paid to PCS. The Home Office, the Department for Environment, Food and Rural Affairs and the Commissioners for HM Revenue and Customs withdrew these check-off arrangements at various dates in 2014 and 2015. The employees brought claims against their employers. PCS was also a claimant. The Court of Appeal held that the employees had not accepted the variation of their contracts by continuing to work. However, by a majority, it held that section 1 of the *Contracts (Rights of Third Parties) Act 1999* (UK) (the 1999 Act) did not give PCS the right to enforce the term offering the facility for the check-off arrangements. PCS appealed.

The Court held (joint judgment of Lord Sales and Lady Rose, Lord Reed, Lady Simler agreeing, Lord Burrows agreeing but writing separately), allowing the appeal:

- No term can be implied in fact in those contracts so as to rebut the statutory presumption. Applying the demanding test for implication of a term, it was not at all clear that an objective bystander would have concluded that the parties to the individual contracts of employment must have intended that the check-off arrangement should not be legally enforceable by the Union. If anything, in the circumstances existing when the contracts of employment were entered into, the more natural assumption of the parties and an objective bystander would probably have been that the Union should be able to enforce the arrangement [107] (Lord Sales and Lady Rose, Lord Reed, Lady Simler agreeing).
- There was no inconsistency between recognising that a collective agreement was unenforceable as between employer and trade union and allowing a trade union a right of enforceability against the employer under an employment contract by reason of the 1999 Act. The fact that a majority of shareholders could theoretically ratify an invalid allotment of shares does not make it valid: there would need to be an actual ratification, and any attempt to do so would be constrained by the rule against the oppression of a minority: [80]-[81], [84] (Lord Burrows).