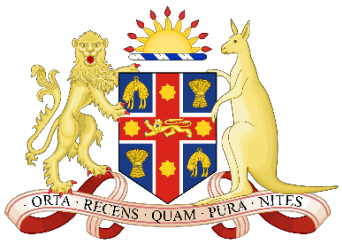

Decisions of Interest

23 December 2024 – 14 February 2025

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

Contracts: construction of releases in settlement deeds

***Sanmik Food Pvt Ltd v Alfa Laval Australia Pty Ltd* [2025] NSWCA 7**

Decision date: 10 February 2025

Adamson, McHugh JJA and Griffiths AJA

The respondent (the vendor) contracted to sell the appellant (the purchaser) two coconut milk production plants comprised of various components. According to the contract, title in the components would not transfer to the appellant until payment had been received by them in full. The vendor delivered a homogeniser and filler to the purchaser but did not receive full payment. The vendor then commenced proceedings alleging breach of contract. The parties agreed to settle and executed settlement documents which provided for "a new supply [of two plants] that is independent of the previous Contract". In cl 3.2 of the Settlement Deed, the vendor agreed "that the parties have no further obligations in respect of the [initial contract]" (cl 3.2(a)) and released the purchaser "from all Claims and actions arising from or in connection with the Settled Matters" (cl 3.2(b)). "Claim" was defined as including "any claim, action or liability of any kind" and "Settled Matters" included "all claims and disputes between [the parties] which were the subject of, or in any way related to" the supply of the first plant. The documents were silent as to what would become of the homogeniser and filler already delivered. The purchaser alleged that the vendor was not entitled to use the previously supplied homogeniser and filler to discharge part of its new obligation to supply two plants. The primary judge dismissed the purchaser's claim.

The Court held (Griffiths AJA, McHugh JA agreeing with additional reasons, Adamson JA dissenting), dismissing the appeal with costs:

- The purchaser was obliged to hold the components as bailee for the respondent until the full price of the items was paid. As this never occurred, ownership was never transferred from the vendor to the purchaser. This bailee-bailor relationship existed as a matter of law, was not contingent on the contract remaining in force, and was therefore not within the scope of "obligations in respect of the [initial contract]". Accordingly, cl 3.2(a) did not release the purchaser from their obligations as bailee: [118]-[126]; [165]-[173].
- The word "claim" in cl 3.2(b) referred to a dispute or contest between the parties and not to an undisputed claim of right, such as that applying to the vendor's ownership of the two components. Therefore, the release did not prohibit the vendor from asserting their claim to ownership of the items: [129]-[139]; [176]-[178].
- No "supply" had occurred under that word's definition in the initial contract, as the entire plant had not been received. Therefore, the reference in the settlement documents to "new supply" "independent" of the initial contract did not preclude the vendor from using the already delivered items to fulfil its obligations under the settlement documents: [141]-[142]; [183]-[187].

Equity: failed joint endeavour, constructive trusts

***Hellenic Property Holdings Pty Ltd v Makaritis* [2025] NSWCA 13**

Decision date: 14 February 2025

Mitchelmore JA, Basten AJA and Griffiths AJA

In February 2019, the respondent (B) was ordered to pay a family law settlement which would require him to sell his residence (the Property). In an effort to avoid selling the family home, B conceived a plan with his son (L) in which the appellant, Hellenic Property Holdings Pty Ltd (HPH) (a holding company with L as the sole shareholder and director) would acquire a loan and purchase the Property from B at an undervalue to hold as trustee of a discretionary trust. The proposed goal was to allow B to continue living at the property, either in the main house or in a new granny flat, the construction of which would be financed by the loan. With the family law settlement looming, HPH entered into a less favourable loan agreement than initially intended. As B was required to contribute further monies to discharge HPH's liabilities, the relationship between B and L broke down with B becoming suspicious that L was attempting to take the Property for himself. In March 2020 L caused HPH to serve a formal eviction notice on B. B sought a declaration that he had an equitable interest in the Property that allowed him to reside there for as long as HPH was the registered proprietor. Alternatively, B sought a declaration that he had a charge over the Property to secure his financial loss in transferring the Property to HPH and making financial contributions to HPH in relation to the Property. The primary judge found there existed a joint endeavour which had failed when L served the eviction notice on B, and declared a constructive trust over the Property in B's favour.

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

- There was a joint endeavour between the parties. While the specifics of the plan changed as financial and time pressures intensified, the core purpose of the endeavour remained constant until its failure. The core objective was to keep the Property in the family and to allow B to live there, rent free if possible. This was evidenced by continued references by B and L to that goal and the financial decisions of B and L being consistent with that objective [8]-[85].
- The joint endeavour was of an essentially domestic character, driven by B's desire to keep the Property in the family. It was not necessary to descend into the rights and wrongs of the breakdown of the relationship, even though B's suspicions of L were unfounded; what mattered was that trust, the substratum of the endeavour, broke down between B and L: [86]-[94].
- While HPH had made a critical contribution by taking out the loan, B had also made a critical contribution by selling the Property to HPH at an undervalue. The primary judge's declaration of a constructive trust was appropriate notwithstanding that L was a reluctant participant in the endeavour, and both parties were entitled to equal shares in any surplus following repayment of their respective contributions to the joint endeavour: [95]-[108].

Real property: easements, compelling consent to development works

***Owners Corporation Strata Plan 533 v Random Primer Pty Ltd* [2025] NSWCA 8**

Decision date: 12 February 2025

Gleeson, Mitchelmore, and Kirk JJA

The appellant and the respondent owned neighbouring properties, being Lot 2 and Lot 1 in the deposited plan respectively. Lot 1 had the benefit of a registered right of way (ROW) over a shared driveway located on Lot 2, immediately adjacent to Lot 1. The respondent wished to replace the existing building on Lot 1 with an apartment block and lodged a development application (DA) with the local council to that effect. The DA proposed to extend the width of a portion of the driveway by approximately 1.5 metres onto Lot 1. The Council concluded that the DA related to lots 1 and 2 and the *Environmental Planning and Assessment Regulation 2021* (NSW) therefore required the appellant's consent to the DA. The appellant did not consent. The Council refused to grant development consent to the DA because of, inter alia, the lack of consent from the appellant. That refusal by the Council was being challenged in the Land and Environment Court at the time of the appeal. Concurrently, the respondent brought proceedings in the Supreme Court seeking a mandatory injunction requiring the appellant to consent to the making of the DA. The primary judge upheld the respondent's claim on the basis that the refusal to give consent substantially interfered with the appellant's rights as owner of the dominant tenement.

The Court held (Kirk JA, Gleeson and Mitchelmore JJA agreeing) granting leave then dismissing the appeal:

- The appellant argued: (1) the Council was correct to require the appellant's consent to the development; and (2) the works were outside the scope of the ROW (and the rights attached to it) and therefore the appellant could not be required to consent. The court rejected this, holding that if the appellant accepted the council's view that the works related to lots 1 and 2, then it must accept the proposed works were an extension of the current driveway and therefore within the scope of the ROW. Further, the slight extension of the driveway beyond the boundary of the ROW could not reasonably be characterised as outside of the scope of the ROW. The appellant's refusal to consent substantially interfered with the respondent's rights and the respondent could be compelled to consent: [44]-[54].
- The court rejected the argument that because the DA was ambiguous, the appellant could not be sure what they were consenting to and therefore could not be compelled to consent. It held that private law rights are distinct from the statutory planning regime they operate around. If amendments or further works are approved in the future (such as a widening of the proposed driveway or the demolition of the current driveway), the appellant can complain and assert its rights at that point in time. Until then, using future possibilities to argue against the injunction is an unhelpful exercise in shadow boxing: [55]-[70].

Australian Intermediate Appellate Decision of Interest

Private international law: sovereign immunity and international arbitral awards

***Republic of India v CCDM Holdings, LLC* [2025] FCAFC 2**

Decision date: 31 January 2025

Derrington, Stewart, Feutrill JJ

In 1998, India concluded a bilateral investment treaty (**BIT**) with Mauritius. The BIT allowed for a regime of arbitration including for claims by investors against India for violations of their rights under the BIT. The original applicants (whose rights and interests in the proceedings were later assigned to the respondent) were incorporated in Mauritius. In July 2012, they commenced proceedings in the Permanent Court of Arbitration (**PCA**) at The Hague alleging that India had expropriated their investments in India without compensating them in breach of the BIT. In July 2016, the PCA issued an arbitral award to the applicants. The applicants commenced enforcement proceedings of the award in the Federal Court. The key issue was whether, by ratifying the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (**the Convention**), the Republic of India "submit[ted] … by agreement" within the meaning of s 10(2) of the *Foreign States Immunities Act 1985* (Cth) (**the Act**) to the jurisdiction of the Federal Court of Australia. If s 10(2) did not apply, then India could claim immunity from the Court's jurisdiction under s 9 of the Act. The primary judge found that India had submitted by agreement to the jurisdiction of the Court with respect to the arbitral award enforcement proceedings.

The Court held (unanimous joint judgment), allowing the appeal:

- India submitted a reservation on ratifying the Convention which reserved India's right not to abide by the Convention except with respect to "differences arising out of legal relationships, whether contractual or not, which are considered as commercial". Therefore, India was released from compliance with the Convention in relation to non-commercial disputes and was reciprocally unable to enforce compliance with the Convention on other ratifying states in relation to such disputes: [46]-[69].
- A submission under s 10(2) must be made in "a clear and recognisable manner" to the requisite "high level of clarity and necessity" such that it is "unmistakable". Due to India's reservation, that threshold had not been met. Therefore, India did not waive foreign state immunity in respect of awards arising out of non-commercial legal relationships: [71]-[75].
- The award was non-commercial in nature because it arose out of India's relationship with the BIT, which is in the realm of public international law. Therefore, India had not waived its sovereign immunity with respect to the arbitral award and the Court lacked jurisdiction to hear the enforcement proceedings.

Asia Pacific Decision of Interest

Equity: statutory limitation periods and constructive trusts

Hui Chun Ping (許遵平) v Hui Kau Mo (許教武) **[2024] HKCFA 32**

Decision date: 23 December 2024

Cheung CJ, Ribeiro, Fok, Lam PJJ and Lord Hoffmann NPJ

The respondent acted as the agent of the appellant to negotiate the terms of a consultancy services agreement between the appellant and a property developer. The appellant was to be paid by the developer with cash and a 10% interest (**the Shares**) in the profit of the development venture. In 2006, the respondent convinced the appellant to accept a lump sum payment instead of the Shares and secretly obtained the Shares for himself. The appellant discovered this in late 2012 but did not commence proceedings against the respondent until 13 November 2018. He later sought to introduce a claim for breach of fiduciary duty to recover the Shares allegedly held for him on a constructive trust. The respondent argued that this claim was time barred by the *Limitation Ordinance (Cap 347)* (HK) (**the Ordinance**) which relevantly prescribed a limitation period of 6 years. Section 20(1)(b) of the Ordinance (which substantially replicated s 19 of the *Limitation Act 1939* (UK), now s 21 of the *Limitation Act 1980* (UK)) exempted from the operation of the limitation period "action[s] by a beneficiary under a trust… to recover from the trustee trust property". The appellant argued, inter alia, that by virtue of s 20 no limitation period applied to his action.

The Court held (Lord Hoffmann NPJ, Cheung CJ, Ribeiro, Fok and Lam PJJ agreeing), unanimously dismissing the appeal:

- The Ordinance traces its legislative ancestry back to s 8 of the *Trustee Act 1888* (UK). The 1888 and 1939 UK acts instituted a fixed limitation period for claims for breach of trust where none had previously existed. At general law, the lack of limitation period was because, for the purpose of limitations, equity would fictitiously ignore the misapplication of trust assets and treat the case "as if" the trustee had acted in accordance with the trust.: [14] - [16].
- However, there is a distinction between a trust arising before the occurrence of the transaction impeached and trusts arising only by reason of that transaction. In the latter case, time runs from the moment the constructive trust arises. This approach has been carried over to the statutory context. Provisions such as s 20 do not exempt constructive trust claims from limitation. Thus, the Ordinance should be read as providing constructive trustees with the protection of a period of limitation, rather than depriving them of a protection they had enjoyed at general law and under the UK acts: [18] - [31].
- Therefore, s 20 of the Ordinance did not exempt the appellant's action from the limitation period: [35].

International Decision of Interest

Administrative law: seeking habeas corpus when appeal mechanism available

***The Father v Worcestershire County Council* [2025] UKSC 1**

Decision date: 29 January 2025

Lord Reed, Lord Sales, Lord Leggatt, Lord Stephens and Lady Simler

The appellant was the father of two children who were placed in the care of the respondent under a care order made by a judge of the Family Court. The care plan for both children was for them to be in long term foster care and both children were, at the time of hearing, living with the same foster parents. The appellant applied for a writ of habeas corpus seeking the release of his two children. The application was dismissed by the High Court on the basis that the correct process was for the father to appeal the care order. The Court of Appeal found that the High Court hearing had been procedurally unfair and set aside the judge's order. Reconsidering the matter, the Court again dismissed the application on the bases that the application was not the correct process and that the children were not detained and thus habeas corpus was an inappropriate remedy.

The Court held (Lord Sales and Lord Stephens writing jointly, Lord Reed, Lord Leggatt and Lady Simler agreeing), unanimously dismissing the appeal:

- The father had a right to both appeal against the care order and to apply to discharge the order under the Family Procedure Rules 2010 and *Children Act 1989*, respectively. Appealing against the decision afforded a number of procedural advantages to the court, primarily that the father and the council would be parties to the appellate proceedings and a guardian would be appointed under the *Children Act 1989* (UK) who would be under a duty to safeguard the interests of the children: [23]-[30].
- The ordinary exercise of parental responsibility under a care order by a local authority, or foster parents' exercise of their delegated authority, will not usually deprive a child of liberty amounting to detention, though, in extreme cases of improper exercise of parental responsibility by the carer, it may: [37]. In such extreme cases, habeas corpus will theoretically be available. However, the appropriate order in that case would be that the child be released from detention, not that the care order be set aside: [38]-[40]. In this case, however, the children were not detained: [53].
- A person detaining an individual will have a complete defence to a writ of habeas corpus by showing that they have lawful authority for the detention, i.e. the care order. Habeas corpus cannot be used to challenge the lawfulness of a court order because the writ is directed towards the detainer, not the court. Therefore, before habeas corpus can succeed, the court order must be challenged by other means: [54]-[97]. The father should instead seek recourse through the statutory regime established by the *Children Act 1989*.