Court of Appeal
Supreme Court
Sydney

Decisions of Interest

29 July 2024 – 12 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

Limitation of Actions: Breach of Fiduciary Duties

Aidzan Pty Ltd (in liq) v K. & A. Laird (N.S.W.) Pty Ltd (in liq) **[2024] NSWCA 185**

Decision date: 30 July 2024

Ward P, Meagher and Adamson JJA

K. & A. Laird (N.S.W.) Pty Ltd (KAL) made claims against its sole director, Mr Peter Laird for breaches of fiduciary duty and two companies controlled by him for knowing receipt of property. The principal question was whether Mr Laird's knowledge of the facts giving rise to those claims was to be attributed to KAL for the purpose of determining when the company 'first discovers' them *(Limitation Act 1969* (NSW), s 47(1)(e)). The primary judge held that attribution turned on the application of the 'fraud exception' as formulated in *Beach Petroleum NL v Johnson* (1993) 43 FCR 1; [1993] FCA 392. If that exception was not engaged, Mr Laird's knowledge was to be attributed to KAL and in consequence would trigger the running of that 12-year limitation period.

The Court held (Meagher JA, Ward P and Adamson JA agreeing) dismissing the appeal and allowing the cross-appeal:

- Where a company brings a claim against a director for fraud or breach of duty, the knowledge of that director will not be attributed to the company as or in support of a defence to the company's claim: [68]-[71].
- The preferable approach is to recognise that the rules and principles as to the attribution of corporate knowledge in each case depend on the nature of the claim and purpose for which that attribution is sought: [70]-[72].
- Separately, as a matter of construction, s 47(1)(e) of the *Limitation Act* could not be satisfied by the attribution of Mr Laird's knowledge to KAL. In respect of KAL's claim to the proceeds of sale of a property, time did not commence running until the appointment of KAL's liquidator in August 2018: [78].
- The success of the appeal in respect of this claim, and of the cross-appeal, depended on the outcome of the question as to attribution of Mr Laird's knowledge to KAL. The entirety of KAL's claim for recovery of rental payments was brought within the time prescribed by s 47(1). Judgment for KAL on that claim should be increased from $1.2 million to $2,094,545: [83]-[84], [87], [89].
- The language used in *Limitation Act*, s 55(1) is relevantly the same as that used in s 47(1)(e). Accordingly, for the above reasons, Mr Laird's knowledge as to the circumstances of the Superannuation Payment claim was not to be attributed to KAL, with the result that the claim was not barred by analogy: [96].

Professional and Trades: Medical Practitioners

***Medical Council of New South Wales v Mooney* [2024] NSWCA 180**

Decision date: 30 July 2024

Leeming and Kirk JJA, Price AJA

Mr William Mooney was first registered as a medical practitioner in 1990, and principally practised as an ear, nose and throat surgeon. Since 2013, he was the subject of various professional complaints, which culminated in a finding of professional misconduct by NCAT in late 2021.

On 21 April 2022, NCAT made orders cancelling Mr Mooney's registration as a medical practitioner and prohibiting him from reviewing that order for 12 months. Mr Mooney subsequently sought a review of those orders on 24 April 2023. In the period between his cancellation and the review hearing, Mr Mooney was arrested, charged and pleaded guilty to possession of 0.5g of cocaine. In the review decision, NCAT found that Mr Mooney had attempted to mislead police during the events of his arrest and that he had been dishonest in his interactions with medical practitioners by not giving them an honest account of his arrest. However, NCAT held that it was appropriate to make a reinstatement order subject to conditions on Mr Mooney's registration.

The Medical Council appealed but did not challenge the finding that there was now no risk to public health. Instead, it relied on Mr Mooney's subsequent conduct.

The Court held (Leeming JA, Kirk JA and Price AJA agreeing) dismissing the appeal with costs:

- It was open to NCAT to treat Mr Mooney's dishonesty concerning the events of his arrest as significantly different from, and less blameworthy than, his premediated and sustained misleading conduct which led to his deregistration: [128]
- No error has been shown in the conclusion reached by NCAT that Mr Mooney is, subject to the imposition of appropriate conditions, able to be reinstated to practice in the medical profession: [138].
- There was ample evidence to conclude, as NCAT did, that Mr Mooney can be trusted to practise in an honest and ethical manner, that he presents no risk to safety, and that his predilection to mislead may be addressed by appropriate treatment. As already noted, the absence of a risk to safety was found by NCAT and was not the subject of any challenge in this Court, while the conditions proposed appear to go far to address the remaining risks: [139].
- It was open to NCAT to impose a reinstatement order subject to conditions (Category C supervision for Specialist Otolaryngological practice, mentor supervision for all other non-operating theatre practice, and, especially, to work no more than 35 hours a week while under supervision): [132].

Estoppel: Proprietary Estoppel

***Slade v Brose* [2024] NSWCA 197**

Decision date: 8 August 2024

Ward P, White and Stern JJA

Bruce and Donna Slade (the Slades) owned several parcels of farming land in Quandialla. In 2014, Kellie Brose and Garreth Brose (the Broses) relocated from Townsville to Quandialla following representations by the Slades, that if they relocated there and worked for the family partnership, through which the Slades conducted their farming business, then they would receive an interest in certain parcels of the farming land. Following a falling out between the Slades and Broses, the Slades renounced the existence of any arrangement they had with the Broses and began to liquidate their rural land holdings and partnership assets. The Broses lodged caveats on the titles to the properties which they alleged were held by the Slades on trust for them by reason of their detrimental reliance on the Slades' representations.

The primary judge found that the disputed properties were held on a constructive trust. The Slades appealed, alleging error in the primary judge's findings.

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

- The Slades' representations were sufficiently clear, and that in a family context it was reasonable for the Broses to rely on the repeated assurances by the Slades that they could and should trust the Slades, and that they would then get most of the land and partnership business: [207].
- The decision to move to Quandialla, and not take up opportunities elsewhere, was more than sufficient to amount to detrimental reliance: [274]-[288]
- In determining reliance in the context of estoppel by encouragement, the relevant assumption need not be the sole inducement, rather it is sufficient if it is a 'contributing cause': [246].
- The Slades' characterisation of their representations as being 'conditional' was rejected, in the sense that, if the matters there set out were no longer capable of satisfaction, then there would be no reasonable expectation that the transfers of land would be made. Rather, the Court held that matters such as the intent that family relationships remain intact, and that there be a fair outcome, are more readily to be seen as assumptions underlying what was contemplated in the succession planning process: [306].
- It was not necessary for the primary judge to determine whether there was power to grant the relief sought by the Slades on the basis that the Broses' interest in the properties was indefeasible: [328].

Australian Intermediate Appellate Decision of Interest

Administrative Law: Judicial Review

***Forrest & Forrest Pty Ltd v Minister for Aboriginal Affairs* [2024] WASCA 96**

Decision date: 9 August 2024

Buss P, Mitchell and Vaughan JJA

Forrest & Forrest Pty Ltd (Forrest) was the lessee under a pastoral lease of the Minderoo Station. The Ashburton River is in the Pilbara region. Forrest proposed to construct 10 weirs across the Ashburton River, at locations where the river flows through Minderoo, together with related bores, infrastructure and access tracks.

The part of the Ashburton River, where the Proposed Works would be located, was an 'Aboriginal site' as defined in s 4 of the *Aboriginal Heritage Act 1972* (WA) (the AH Act). Under s 11A of the AH Act, the responsibility for the administration of the AH Act was vested in the Minister for Aboriginal Affairs (the Minister) who was required to have regard to the recommendations of the Aboriginal Cultural Material Committee (the ACMC). By letter dated 25 March 2019, the Minister informed Forrest that he declined to consent to the use of the land for the project. Forrest lodged an application with the Tribunal for a review of the Minister's decision. The State Administrative Tribunal (Tribunal) ordered that the Minister's decision be affirmed. Forrest's case sets out six grounds of appeal and relies upon the questions of law raised by those grounds.

The Court held (Buss P, Mitchell JA and Vaughan JA writing separately but agreeing with respect to orders), allowing Forrest's appeal:

- The Tribunal may not lawfully give weight to the fact of the Minister's decision under s 18(3) of the AH Act, as opposed to any reasons expressed by the Minister for making that decision. While the Tribunal may consider and agree with the process of reasoning adopted by the Minister in making the decision, the Tribunal will make an error of law if it treats the Minister's decision under s 18(3) of the AH Act as being probative of its own correctness: [198] (Buss P).
- The error of law made by the Tribunal was material to its decision, in the sense that there is a realistic possibility that the decision that was made in fact could have been different if the error had not occurred: [202] (Buss P).
- In determining where the general interest of the community lay, the Tribunal placed some reliance on the Minister's conclusion. Given that reliance, there was a realistic possibility that the Tribunal's decision to refuse consent could have been different if it had not erred in law by giving weight to the fact of the Minister's decision when making its own evaluation of where the general interest of the community lay: [202] (Buss P); 249 (Vaughan JA).

Asia Pacific Decision of Interest

Probate: Mental Incapacity

Lui Ming Lok v Ng Im Fong Loretta **[2024] HKCFA 21**

Decision date: 1 August 2024

Cheung CJ, Ribeiro PJ, Fok PJ, Lam PJ and Lord Neuberger of Abbotsbury NPJ

Mr Lui Kwan Cheung (the Deceased) married Ms Ng Im Fong Loretta, on 1 August 2010, when they were aged 81 and 77 respectively. The Deceased made a will on 21 August 2010, naming the Ms Ng executrix and sole beneficiary. The Deceased died in 2014 and Ms Ng was granted probate of the 2010 Will in 2015. The appellant, Mr Lui Ming Lok, was a beneficiary under an earlier will made by the Deceased on 25 June 1994. It emerged that around the time of the Marriage, the Deceased was suffering from an advanced stage of Alzheimer's disease and was allegedly not capable of handling his daily business completely. On this basis, Mr Lui challenged the validity of the Marriage and of the 2010 Will and sought to propound the 1994 Will.

To propound the 1994 Will, Mr Lui needed to have the Marriage declared void. This appeal addresses whether mental incapacity, suffered by a party to the marriage at the time of its celebration, can render the marriage void, or whether it is only capable of rendering it voidable under the *Matrimonial Causes Ordinance* (Hong Kong) cap 179 (Matrimonial Causes Ordinance). The primary judge and Court of Appeal held in favour of Ms Ng, finding that the Marriage was only voidable but not void in the light of the Deceased's mental incapacity.

The Court held (Lord Neuberger of Abbotsbury NPJ, Cheung CJ, Ribeiro PJ, Fok PJ, Lam PJ agreeing), dismissing the appeal:

- Sections 20(1) and 20(2) of the current Matrimonial Causes Ordinance set out the grounds for rendering a marriage void and voidable respectively. Mental incapacity is not mentioned as a ground for rendering a marriage void under section 20(1); while sections 20(2)(c) and (d) provide that a marriage shall be voidable where a party to the marriage did not validly consent due to 'unsoundness of mind', or though capable of giving a valid consent, was suffering from mental disorder of such a kind or to such extent as to be unfit for marriage.
- It was not accepted that 'severe incapacity' is inferentially covered by section 20(1)(b), which has the purpose of ensuring that provisions in other ordinances are not unintentionally overruled: [71]-[78].
- There is nothing in section 20 of the current Matrimonial Causes Ordinance which expressly restricts its application to a party to the marriage. The Court agreed with Ms Ng that, as marriage is a status and affects not only the parties to the marriage but also other third parties, the same test must apply in determining whether a marriage is void or voidable: [79]-[84].

International Decision of Interest

Judicial Review: Natural Injustice

***Pyaneandee v Leen* [2024] UKPC 27**

Decision date: 13 August 2024

Lord Hodge, Lord Sales, Lady Rose, Lord Richards and Lady Simler

In July 2015, the President of Mauritius appointed a Commission of Inquiry (the Commission) composed of the three respondents to inquire into and report on all aspects of drug trafficking in Mauritius. The appellant, Mr Coomaravel Pyaneandee, was summoned by letter dated 4 August 2017 to appear before the Commission 'to give evidence/explanation regarding [his] unsolicited visits to prisoners involved in drugs trafficking and acts and doings amounting to perverting the course of justice'. Mr Pyaneandee appeared before the Commission and was deposed. The subsequent Commission Report had a section on Mr Pyaneandee that was critical of him and suggested he was linked with illegal drug activities.

Mr Pyaneandee sought judicial review of the Commission's Report, arguing that the Commission's comments were findings that could be challenged. The Supreme Court of Mauritius dismissed Mr Pyaneandee's application, holding that the report did not contain findings about Mr Pyaneandee but only comments and observations, which could not be judicially reviewed. Mr Pyaneandee appealed to the Judicial Committee of the Privy Council.

The Court held (Lady Simler, Lord Hodge, Lord Sales, Lady Rose and Lord Richards agreeing), allowing the appeal:

- The Supreme Court ought to have concluded that the impugned passages were amenable to judicial review. Mr Pyaneandee was clearly challenging the manner in which the report concluded that there should be a full inquiry into his conduct, and the way that certain passages were expressed: [60].
- The Supreme Court was wrong to hold that the impugned passages were not reached by the Commission without due observance of the law of evidence and in breach of the rules of natural justice. In the circumstances of this case, Mr Pyaneandee was not informed of the gist of the case which he had to answer or shown the relevant material in relation to the allegations identified above. The Commission did not afford Mr Pyaneandee a fair opportunity to give worthwhile evidence and make worthwhile representations on his own behalf: [67]-[85].
- The failure to make adjustments in Mr Pyaneandee's case (considering his hearing and sight impairments) did not render the Commission's actions unlawful. The transcript reflects the Mr Pyaneandee's broad ability to hear and answer the questions. On the odd occasion where there was difficulty or confusion, the question was repeated: [86]-[88].