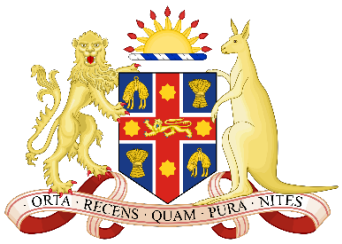

Decisions of Interest

2 December 2024 – 19 December 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

Land law: claimable Crown lands

New South Wales Aboriginal Land Council v Minister Administering the Crown Land Management Act 2016 **[2024] NSWCA 294**

Decision date: 11 December 2024

Adamson and Stern JJA, Preston CJ of LEC

The New South Wales Aboriginal Land Council (the Land Council), filed two land claims in respect of land located in Jannali appealed against a decision of the Land and Environment Court that Lot 3 in Deposited Plan 1001659 in Jannali (the claimed land) did not constitute "claimable Crown lands" within the meaning of s 36 of the *Aboriginal Land Rights Act 1983* (NSW) (the Act). The primary judge held that the claimed land was not claimable Crown lands on the basis of s 36(1)(c), because it was needed, or likely to be needed, for an essential public purpose, namely that of education, as evidenced by its sale to the St George & Sutherland Community College Inc (the College). The Land Council appealed, claiming errors in applying s 36(1)(c) of the Act, including failing to address that the claimed land was needed for an essential public purpose, wrongly accepting evidence of a proposed sale to the College, and unreasonably finding the land was not claimable Crown land.

The Court held (Adamson JA, Stern JA and Preston CJ of LEC), allowing the appeal:

- The primary judge correctly identified the principles which apply to s 36(1)(c) of the Act, including that the executive government was required to form a positive opinion that claimed land was needed for an essential public purpose: [39], [47].
- However, her Honour's reasons did not disclose a finding that an actual decision was made, or positive opinion formed that the claimed land was needed for the essential public purpose of education. Her Honour failed to ask and answer the correct question in deciding whether the Minister established the requirements of s 36(1)(c). This ground was made out: [48]-[49].
- The primary judge erroneously relied on evidence of the nature of the College's services, which did not bear on the executive government's opinion whether the claimed land was needed for an essential public purpose. The primary judge asked the wrong question, and this ground was made out: [51], [54]-[55].
- The primary judge's conclusion that the claimed land was not claimable Crown lands within the meaning of s 36(1)(c) of the Act was legally unreasonable. The evidence (relevantly, the briefing note) merely indicates the land was to be sold because it was surplus to educational requirements and could be sold to the College (a private body). The Minister's decision was inconsistent with the claimed land being needed for an essential public purpose and was incapable of discharging the Minister's onus under s 36(7) of the Act: [63]-[69].

Compulsory acquisition of land: market value of land

***Goldmate Property Luddenham No 1 Pty Ltd v Transport for New South Wales* [2024] NSWCA 292**

Decision date: 9 December 2024

Gleeson and Adamson JJA, Preston CJ of LEC

On 30 June 2021, Transport for NSW compulsorily acquired part of a property owned by Goldmate Property Luddenham No 1 Pty Ltd (Goldmate) located near the Western Sydney Airport site at Badgerys Creek. The property was acquired pursuant to Transport for New South Wales' power under s 177 of the *Roads Act 1993* (NSW) (*Roads Act*), which enabled Transport for New South Wales to acquire property for the purposes of the *Roads Act*. The acquired property was to be used for the M12 motorway but was part of a broader State Government infrastructure plan in response to the announcement of the airport. Proceedings were commenced in the Land and Environment Court to determine the amount of compensation payable to the appellant for the acquisition pursuant to the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), which the primary judge determined to be $9,761,480, including $9,523,500 for market value under s 55(a) of the Act, and $100,000 for injurious affection to the portion of the property retained by the appellant under s 55(f). Goldmate submitted that the public purpose s 56(1)(a) was limited by the scope of the respondent's power to acquire land under the *Roads Act* and could only be a purpose for which the *Roads Act* provided.

The Court held (Adamson JA, Gleeson JA agreeing and Preston CJ of LEC agreeing with additional reasons), allowing the appeal:

- An acquiring authority's public purpose in acquiring certain land (as the term was used in s 56(1)(a)) must fall within the public purpose or purposes for which the acquiring authority has power to acquire land, as contained in the legislation which empowers the acquiring authority to do so: [71].
- In this case, the only identified relevant purpose under the *Roads Act* for which the respondent was authorised to acquire the property was to carry out road work for a freeway. The respondent was not empowered by the *Roads Act* to acquire land for purposes which included wider objects, such as to promote economic development in the area of the Western Sydney Airport. The primary judge's finding that the public purpose in s 56(1)(a) included the broader purpose for which the property was acquired was therefore legally erroneous: [73]-[75], [77].
- The amount of compensation that the appellant was entitled to was set aside, and the matter was remitted to the Court below so that the market value of the land could be assessed on the correct legal basis: [79], [111].

Corporations: relationship between common law, equity and statute

***Harris Health Care Pty Ltd (receivers and managers appointed) (in liq) v Hayes* [2024] NSWCA 301**

Decision date: 19 December 2024

Bell CJ, Leeming and McHugh JJA

The appellant, Harris Health Care Pty Ltd (HHC), was the majority shareholder of Sirrah Pty Ltd (Sirrah). In 2021, Sirrah obtained judgment against HHC for $17 million. At that time, Sirrah was in provisional liquidation. HHC was wound up in 2022 after Sirrah issued a statutory demand for the judgment debt. Sirrah's liquidator reported a $5 million surplus and sought special leave pursuant to s 488(2) of the *Corporations Act 2001* (Cth) to distribute the entirety of that surplus to Sirrah's minority shareholder. The primary judge granted that special leave, holding that "the rule in *Cherry v Boultbee*", that a claimant on a fund who also owes money to the fund is precluded from participating in the fund until it satisfies its outstanding obligation, applied when determining the distribution of any surplus to those "entitled" under s 488 of the Act. As a result, HHC received no part of the surplus. HHC subsequently appealed.

The Court held (Leeming JA, Bell CJ and McHugh JJA agreeing), dismissing the appeal:

- The "rule" in *Cherry v Boultbee* was an example of neither set-off nor retainer. Rather, it was a simple technique of netting-off reciprocal monetary obligations by allowing an administrator of a fund to deem a claimant as having been satisfied out of a debt they still owe to the fund: [73]-[123].
- The application of that accounting process was not incoherent with the policy or purpose of the *Corporations Act*. To the contrary, it was in accordance with the purpose of the Act to facilitate the timely winding up of companies by relieving the liquidator of the need first to write off or compromise a claim against a contributory in order to determine a final surplus, an aliquot share in which was then to be distributed to that contributory. The Act's silence on this topic reflected an intention to accommodate the familiar method of netting off that had been practised for centuries in cognate contexts: [124]-[140].
- Sirrah was not confronted with irreconcilable alternatives, and should not be held to have made an election. Sirrah lodged a proof of debt in advance of a creditors' meeting to approve the liquidator's remuneration, and at a time when the liquidator advised that there would probably be no distribution to any creditor. Sirrah subsequently withdrew its proof of debt and never obtained any distribution: [141]-[149].
- There was no subversion of the priority of secured creditors. The secured creditor's security was not over any property in the hands of Sirrah's liquidator. It had no security over the $5 million realised, and could have no security over the judgment debt owed by HHC to Sirrah, which was a liability of HHC not an asset: [150]-[154].

Australian Intermediate Appellate Decision of Interest

Torts: scope of duty of care owed by occupier football club to child spectators

Footscray Football Club Ltd v Adam Kneale **[2024] VSCA 314**

Decision date: 12 December 2024

Emerton P, Beach JA and J Forrest AJA

The Respondent, Mr Adam Kneale sued the Footscray Football Club (the Club), now known as the Western Bulldogs, for abuse perpetrated by Graham Hobbs in the 1980s when Mr Kneale was a child. Mr Kneale would attend the Western Oval as a spectator and was not a member of the Club or a junior player. Mr Hobbs was an unpaid volunteer for the Club. Mr Kneale sought compensatory, exemplary and aggravated damages from the Club for injury, loss and damage alleged to have been caused as a result of the abuse perpetrated by Hobbs. Mr Kneale alleged the Club was liable in negligence. Mr Kneale also pleaded that the Club was vicariously liable for the torts of assault and battery committed by Hobbs. On 9 November 2023, a jury found that the Club was liable in negligence and awarded judgment against the Club in the sum of $5.94 million. The Club appealed the verdict of the jury.

The Court held (Beach JA and J Forrest AJA, Emerson P dissenting), dismissing the appeal in part:

- The Club had to persuade the Court that the verdict returned by the jury was not open to it. The Court was not entitled to set aside a jury's verdict merely because the verdict was different from that which it would itself have reached: [284] (Beach JA and J Forrest AJA).
- The judge's directions to the jury in relation to the scope of the duty of care owed by the Club to Mr Kneale were not erroneous. The duty of care was broad and required the Club to reasonably foresee Mr Hobbs' actions. This included taking reasonable steps to protect young boys from Mr Hobbs' abuse [226]-[271] (Beach JA and J Forrest AJA).
- Notwithstanding the devastating outcome for Mr Kneale as a result of Mr Hobbs' abuse, an award of $3.25 million in damages was too high. An appropriate award for Mr Kneale's general damages was $850,000: [587]-[602].
- The jury's verdict of $2,605,578 lacked a proper evidentiary basis. The only reliable figure to calculate economic loss was the ABS average earnings for a male with Year 12 education, similar to Mr Kneale's qualifications, which amounted to $1,679,003 assuming full-time work until age 67. Therefore, the verdict should have been set aside and replaced with $1,700,000: [689]-[699] (Beach JA and J Forrest AJA).
- It was not open to the jury to conclude that the Club knew or ought to have known of the reasonably foreseeable risk of injury that Mr Hobbs posed to young boys who attended the Western Oval in the 1980s. Leave to appeal should be granted and the appeal allowed [2]-[3] (Emerton P dissenting).

Asia Pacific Decision of Interest

Contract law: termination of a banking relationship by a bank

***Bank of New Zealand v The Christian Church Community Trust & Ors* [2024] NZCA 645**

Decision date: 9 December 2024

Goddard, Katz and Mallon JJ

In July 2022, the Bank of New Zealand (BNZ) informed various entities associated with the Gloriavale Christian Community of its intention to terminate their banking services under clause 8.2 of its standard terms and conditions, which allowed termination "for any reason" with 14 days' notice, citing its internal human rights policy following a decision of the Employment Court concerning mistreatment of children working for the community. The Gloriavale entities unsuccessfully sought alternative banking arrangements and then applied for an interim injunction to prevent the termination, arguing it would breach the banking contract and an asserted fiduciary duty. The Gloriavale entities sought this injunction in the High Court on a without-notice basis to prevent BNZ from terminating its banking relationship with the Gloriavale entities, and the injunction was granted on 7 December 2022. On 8 September 2023, a second, on-notice interim injunction was granted, which prevented BNZ from terminating the Gloriavale entities' accounts until trial. BNZ appealed.

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

- By applying standard contractual interpretation principles, it was not seriously arguable that clause 8.2 of the BNZ standard terms limited the reasons for which BNZ could terminate its banking relationship with the Gloriavale entities. Rather, under clause 8.2, BNZ could terminate the banking relationship for any reason: [10], [90]-[113].
- Although the question of what approach should have been adopted in relation to implied terms concerning the exercise of contractual discretions was unsettled, it was arguable that there had been an implied term in the BNZ standard terms that BNZ must exercise the clause 8.2 power for the purpose for which that power was conferred under the contract. But even if such an implied term had existed, it would not have added anything in this case because the purpose of clause 8.2 was to enable BNZ to bring the banking relationship to an end if it wished to do so for any reason, and BNZ was not seeking to invoke this clause for an ulterior motive. It was not seriously arguable that BNZ had breached such an implied term: [113]-[146].
- It was also not seriously arguable that BNZ owed the Gloriavale entities a fiduciary duty which would have been breached if BNZ had terminated its banking relationship with them, or that BNZ had been estopped indefinitely from terminating the relationship: [165]-[168].

International Decision of Interest

Equity: vendor— purchaser constructive trusts

***Frenkel (Appellant) v La Micro Group (UK) Ltd and others (Respondents)* [2024] UKSC 42**

Decision date: 11 December 2024

Lord Hodge, Lord Briggs, Lord Sales, Lady Burrows, Lord Richards

This appeal involved the ownership of LA Micro Group (UK) Ltd (UK), a company initially set up in 2004 as a joint venture between Mr Bell and the Californian company LA Micro Group, Inc (Inc), owned by Mr Lyampert and Mr Frenkel. In 2010, following a dispute between Mr Lyampert and Mr Frenkel, Mr Lyampert and Mr Bell agreed to split the profits of UK equally between them, with Mr Lyampert assuming Inc's debt to UK (the 2010 Agreement). It was held to be an implied term of that agreement that UK would transfer their beneficial interests in the shares to the legal holders – Messrs Bell and Lyampert. At first instance, it was held that the beneficiaries did not "contractually surrender" their beneficial interests, because of the requirement of signed writing in the *Law of Property Act 1925* (UK) (LPA). The Court of Appeal held there was a constructive trust to which the requirement of signed writing did not apply, because of the exception in s 53(2) of the Act.

The Court held (Lord Briggs, Lord Hodge, Lord Sales, Lord Burrows and Lord Richards agreeing), dismissing the appeal:

- The absence of signed writing would not make the transfer ineffective if the circumstances gave rise to a vendor-purchaser constructive trust (VPCT). That was because s 53(2) of the LPA stated that the requirement for signed writing does not affect the operation of a constructive trust. The circumstances created by the 2010 Agreement gave rise to the operation of a purchaser-vendor constructive trust, and so the case fell within the s 53(2) exception: [25]-[30].
- The appellants argued that no VPCT could arise in the circumstances because the implied term of the 2010 Agreement was really concerned with the destruction – rather than the transfer – of equitable interests (leaving the full beneficial ownership of each share to the legal title holder), such that there was no property to which the VPCT could or should attach. However, this did not reflect the substance of the 2010 Agreement, which was concerned with Mr Bell and Mr Lyampert becoming the absolute beneficial owners of Inc's 51% interest and not with the "destruction" of anything [37].
- Even on a strictly technical analysis, it was only after the equitable interest had been transferred to the legal title holders (by the VPCT) that the equitable interest merged with the legal title (and so was destroyed). The VPCT would therefore be momentary, but that did not mean that the courts should refuse to recognise it [43]-[45].
- Section 53(1)(c) of the LPA applies to personalty: [50]-[53].