



Decisions of Interest

15 October 2024 – 30 October 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

Partnerships and joint ventures: partnership accounts

Warner Capital Pty Ltd v Shazbot Pty Ltd [\[2024\] NSWCA 245](#)

Decision date: 15 October 2024

Gleeson, White and Kirk JJA

The second appellant, Mr Warner, and the second respondent, Mr Kugel, were insolvency practitioners who conducted their practice through a partnership known as CRS Warner Kugel from 19 September 2007 to 22 September 2014. The remaining parties in these proceedings were the companies controlled by Mr Warner and Mr Kugel. Shazbot Pty Ltd was a company controlled by Mr Kugel. Warner Capital Pty Ltd, Clarence Street Partners Pty Ltd, and Debtfree Pty Ltd were companies controlled by Mr Warner. In September 2014, Mr Warner decided to bring the partnership to an end and to continue the insolvency practice by himself. At the date of dissolution of the partnership, the firm had on foot 461 insolvency administrations. The significant majority of the work and assets of the practice, including its employees, remained with Mr Warner. This was an appeal from orders of the Equity Division made on 6 September 2023 on the taking of an account between Mr Warner and Mr Kugel.

The Court held (White JA, Gleeson and Kirk JJA agreeing) dismissing the appeal:

- As per issue one of the appeal, no hypothetical purchaser of the book of administration matters could require or accept a discount payment without breaching the relevant professional obligations. This finding was sufficient to dismiss the appeal: [61].
- For the book of administration matters to have a capital value, either positive or negative, the hypothetical vendor and purchaser must not only be assumed to be willing, but they must also be able to dispose of and acquire the book for a price. For the reasons in relation to issue one, this was not permissible: [66].
- The elaborate analyses of the appellants' witnesses, and the responsive analyses of the respondents' witnesses, failed to address the real issues. In such circumstances, there was no reason that the Court should embark on a detailed analysis of their evidence, or the individual files, and the primary judge was right not to do so: [79], [80].
- Whilst a trustee in bankruptcy does not have the right to resign solely because an administration was unfunded, the court has a discretion to allow resignation for that reason. The authorities suggest that such an application would likely be accepted by the court: [76].
- The primary judge's conclusion that a practitioner disposing of their practice would be unlikely to pay a discount as they could instead have resigned, or applied to resign and be replaced, without incurring any costs should be accepted: [77]-[78].

Security for costs

Suchand Pty Ltd v Jonathon Kingsley Colbran and Richard Stone as Receivers and Managers of Suchand Pty Ltd [\[2024\] NSWCA 250](#)

Decision date: 21 October 2024

Ward P, Mitchelmore and Stern JJA

On 6 August 2014, Suchand entered into a lease of a motel in Cooma. Following a dispute with the Commonwealth Bank of Australia, on 10 November 2016, Jonathon Kingsley Colbran & Richard Stone were appointed as receivers (the Receivers) of Suchand's leasehold interest in the motel and all of Suchand's rights, property and undertakings. On 22 September 2017, the Receivers fully retired. On 17 January 2023, Suchand commenced proceedings. Suchand contends that the Receivers abandoned the lease, causing Suchand to lose a business of value. The Receivers sought orders that Suchand pay security for costs. By its appeal, Suchand challenged the primary judge's findings that there was reason to believe that Suchand would be unable to meet the costs of the Receivers and Robtamy (the subsequent lessor) if ordered to do so. Suchand also challenged the primary judge's exercise of the discretion to order security for costs, noting the undertaking proffered by sole shareholder and director of Suchand, Mr Singh.

The Court held (Stern JA, Mitchelmore JA agreeing, Ward P dissenting in part), allowing the appeal:

- Given that Suchand has not traded since September 2017, has only limited paid up capital, has a poor credit rating and has not adduced any evidence other than its claims under clause 14.5 of the Lease and in conversion to support it being able to meet an order for costs, a rational basis has been established for the belief that Suchand will be unable to pay the costs of the respondents if ordered to do so: [54] (per Stern JA, Ward P and Mitchelmore JA agreeing).
- His Honour erred to the extent that his Honour might be taken to have suggested that an order for security for costs should "in general" be made where an impecunious person undertakes to pay any costs order made against an impecunious corporate plaintiff. The primary judge erred in diminishing the weight to be given to the undertaking proffered by Mr Singh on the basis that Mr Singh was not a director at the time of the events giving rise to the litigation: [77]-[78] (per Stern JA, Mitchelmore JA agreeing).
- In re-exercising the discretion of whether to make an order for security for costs no orders should be made for security for costs: [83] (per Stern JA, Mitchelmore JA agreeing).
- The most relevant factors in the present case are the risk of stultification and the likely worthlessness of the proffered undertaking. In my opinion the worthlessness of the proffered undertaking outweighs what I accept to be the real (but not necessarily insurmountable) risk of stultification of the proceedings and the applications for security for costs should be granted: [5], [8] (Ward P dissenting).

Money had and received and knowing receipt

Blue Mirror Pty Ltd v Tan & Tan Australia Pty Ltd (in liq) [\[2024\] NSWCA 253](#)

Decision date: 30 October 2024

Ward P, Leeming and Mitchelmore JJA

In 2020, Pegasus Australia Developments Pty Ltd held money on trust for the appellant, Blue Mirror Pty Ltd. Mr Ken Tan caused Pegasus to disburse \$9,504,800 in breach of trust to the first respondent, Tan & Tan Australia Pty Ltd (Tan & Tan), a company controlled by his brother, Mr Anthony Tan, the second respondent. Tan & Tan then transferred trust money to Anthony, who also transferred to another company of which he was director, Australian Construction Company Pty Ltd (ACC), the third respondent. Blue Mirror obtained judgment for \$10,264,429.62 against Ken, and Pegasus was wound up. Subsequently, Blue Mirror sued Tan & Tan, Anthony and ACC claiming that they were liable at law for money had and received, that they were each knowing recipients of trust property and that Anthony was a knowing assistant in Ken's breaches of fiduciary duty. The primary judge dismissed Blue Mirror's claim. On appeal, Blue Mirror argued that the primary judge erred in failing to look at the totality of the evidence and had reversed the onus of proof by suggesting there was a "forensic obligation" on the appellant to subpoena the supplier.

The Court held (Leeming JA, Ward P and Mitchelmore JA agreeing) refusing leave to appeal against Tan & Tan and allowing the appeal against Mr Anthony Tan and ACC:

- The appeal against Tan & Tan must be dismissed because the first respondent had entered into liquidation and the appellant did not seek leave to proceed against it under section 500(2) of the *Corporations Act 2001* (Cth). But for that, Blue Mirror would have succeeded against Tan & Tan on the basis that it had failed to make out its positive defence and therefore received the money as a volunteer: [75], [116]-[134].
- There were obvious inconsistencies in the purported transactions. The sudden receipt by the respondents of several millions of dollars called for explanation. The facts and implausibilities in the documents themselves resulted in the positive finding that the documents were produced after the event: [116]-[155].
- The effect of the reasons of the primary judge was impermissibly to impose an onus upon the appellant to subpoena the supplier failing which the respondents' positive case would be accepted: [107]-[115].
- The repayment of the traceable proceeds of the trust money by Anthony and ACC did not defeat a claim in knowing receipt. They became liable to account in equity from the moment Anthony became aware that the money had been transferred into Tan & Tan's account in breach of trust: [135]-[155].
- The claim at law in money had and received against Anthony and ACC must fail as the recipients repaid and did not retain the money: [157].

Australian Intermediate Appellate Decision of Interest

International patent publications

Sandoz AG v Bayer Intellectual Property GmbH [\[2024\] FCAFC 135](#)

Decision date: 23 October 2024

Yates, Burley and Downes JJ

Bayer Intellectual Property GmbH (Bayer) was the patentee of the two patents in suit. First, Australian Patent No. 2004305226 (the 226 Patent), and second, Australian Patent No. 2006208613 (the 613 Patent). Bayer Australia Limited (Bayer Australia) was, since 14 February 2023, the exclusive licensee of the 226 Patent and the 613 Patent in Australia. Sandoz AG and Sandoz Pty Ltd (together, Sandoz) sought to revoke the 226 Patent and 613 Patent on various grounds, including that the inventions in the 226 Patent and 613 Patent were obvious in the light of the common general knowledge together with an international patent publication (WO 919), and the 613 Patent were obvious in the light of the common general knowledge together with Abstracts 3003, 3004 and 3010 published in the November 2003 supplement of the journal Blood. The primary judge found that both the 226 Patent and the 613 Patent are valid. Sandoz appealed.

The Court held (Yates, Burley and Downes JJ), allowing the appeal:

- The primary judge erred in finding that a person skilled in the relevant art could not be reasonably expected to have ascertained International Patent Publication No. WO 01/47919 (WO 919) within the meaning of s 7(3) of the *Patents Act 1990* (Cth) as applicable to the patents in suit (the Act). The standard imposed by s 7(3) of the Act does not require proof that the hypothetical skilled person would ascertain the document. Rather, it requires proof sufficient to demonstrate a reasonable expectation that the skilled person would do so, and that was on the balance of probabilities: [43]-[61].
- In circumstances where the primary judge did not find that the formulation or dosing regimen involved an inventive step, and there was no finding that those matters would not have been identified during the course of the conventional clinical trials, the primary judge erred in finding that the inventions claimed in the 226 Patent and the 613 Patent involved an inventive step in the light of the common general knowledge: [89]- [106].
- The primary judge did not err in finding that the invention claimed in the 613 Patent involved an inventive step. The invention was not just the dosage regime; it was the dosage regime associated with that particular chemical compound. Without the identity or structure of BAY 59-7939, or even its chemical class, a skilled person could not conceive of the invention as Sandoz submits and would not be led to the invention as a matter of routine step: [114]-[119].

Asia Pacific Decision of Interest

Equitable liens: modular homes

Benjamin Brian Francis and Simon Dalton as Liquidators of Podular Housing Systems Limited (In Liquidation) v Ilan Gross [\[2024\] NZCA 528](#)

Decision date: 17 October 2024

Gilbert, Goddard and Katz JJ

Podular Housing Systems Ltd (Podular) carried on business constructing and installing modular residential buildings known as "pods". Podular was placed in liquidation, and the appellants were appointed as liquidators. At the time of liquidation, Podular had 18 partly-completed pods at its facilities. The purchasers of each of these pods had paid a deposit and instalments of the purchase price. Another 20 purchasers had paid deposits, but construction of their pods had not begun. The purchasers whose pods had not been partly constructed claimed in the liquidation as unsecured creditors. The primary judge found that each purchaser for whom a pod had been partly constructed had an equitable lien over that pod to the extent of the purchase moneys (including deposit) paid by them. The liquidators appealed to this Court.

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

- The purchasers do not have an equitable lien over their respective partly-completed pods. There was nothing about the arrangements between Podular and the claimant purchasers that distinguishes their position from that of other purchasers who paid deposits but whose pods have not been started. All of these purchasers entered into materially similar contracts, they have all made payments, and they have not yet received Podular's promised performance in exchange of those payments: [97].
- There was no principled rationale which justifies equity providing purchasers of partly-completed pods with a priority over other purchasers and other unsecured creditors, particularly when (unlike some other purchasers) they did not contract for a purchase money security interest: [100].
- There was no appellate authority in New Zealand that supports recognition of a purchaser's equitable lien over personal property in this context, and no persuasive authority from overseas jurisdictions: [150].
- The holder of an equitable lien was not entitled to take possession of the property, and they do not have an ownership interest in it. It follows that if a purchaser's equitable lien were recognised in this case, the liquidators would be entitled to deduct the costs they have incurred in identifying, preserving and selling the pods. The net proceeds after meeting those costs would then be available to meet the purchasers' claims, subject to claims with priority over the equitable liens: [12].

International Decision of Interest

Judicial review

In the matter of an application by Noeleen McAleenon for Judicial Review (Appellant) [\[2024\] UKSC 31](#)

Decision date: 16 October 2024

Lord Lloyd-Jones, Lord Briggs, Lord Sales, Lord Stephens and Lady Simler

Ms Noeleen McAleenon, resided in a property located in the area of the first respondent, Lisburn & Castlereagh City Council. The site was occupied and operated by Alpha Resource Management Ltd (Alpha). Ms McAleenon claims that she has suffered various physical symptoms and a deterioration in her mental health caused by a nuisance odour carried by emissions emanating from the site. Ms McAleenon did not bring an action against Alpha but claims that it was responsible for the alleged toxic emissions. Ms McAleenon applied for judicial review against the respondents. While the High Court held that there was no effective alternative remedy, it dismissed the application. The Court of Appeal dismissed Ms McAleenon's appeal on the ground that there was an effective alternative remedy available against Alpha. Ms McAleenon now appeals to the Supreme Court.

The Court held (joint judgment of Lord Sales and Lord Stephens, Lord Lloyd-Jones, Lord Briggs and Lady Simler agreeing), allowing the appeal:

- Judicial review claims can and should be determined without the need for procedures which are directed to resolving disputed questions of fact, such as cross-examination of witnesses: [40]-[42].
- The Court of Appeal erred in its assessment of the position in relation to Ms McAleenon's judicial review claim. There was no factual dispute about the information available to the defendants which required resolution. Therefore, the question for the court was whether the defendant regulators had done enough to justify their decision (not to take regulatory action against Alpha), applying the usual public law rationality standard and, in relation to the claim under Article 8 of the European Convention on Human Rights, a proportionality analysis. The civil trial model was inappropriate in this context: [44].
- Judicial review was likely to involve much less time and cost than a trial in a private prosecution or nuisance claim. There was no good reason to expect Ms McAleenon to take on the additional burden associated with bringing such proceedings: [59].
- The Court rejected the submission that judicial review should have been refused because Ms McAleenon could have complained to the Ombudsman. The role of an ombudsman was intended by Parliament to supplement, not replace, control of public authorities by the courts through judicial review. Judicial review has priority as against a complaint to the Ombudsman, so such a complaint does not constitute a suitable alternative remedy: [63].