Court of Appeal
Supreme Court
Sydney

Decisions of Interest

3 July 2023 – 16 July 2023

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

Restitution; Contacts: implied terms

Carpenter & Anor v Morris & Anor **[2023] NSWCA 154**

Decision date: 5 July 2023

Bell CJ, White JA and Simpson AJA

In 1996, the second appellant ("Tastex") (controlled by Mr Morris) and the second respondent ("Central West") (controlled by Mr Carpenter) commenced a partnership for the operation of a quarry, and the treatment, marketing and selling of the extracted gabbro. The partnership was dissolved in 2003. Tastex continued to mine and treat gabbro on the basis of an agreement between Mr Carpenter and Mr Morris until 2014 when amendments to the *Mining Act 1992* (NSW) were introduced. Between 2000 and 2003, unbeknownst to the appellants, Mr Morris had been receiving monthly payments in excess of the agreed upon equal division of profits. The primary judge dismissed a claim brought by Carpenter and Central West for, relevantly, restitution of half of the additional monthly payments on the basis that Tastex's failure to sue in the name of the partnership firm was fatal to its claim. Regardless, any relief against Mr Morris for wrongful receipt of partnership income was to be obtained by a claim for knowing receipt of funds obtained in breach of fiduciary obligation, not one of the common money counts. The primary judge also dismissed a claim for damages for repudiation of the agreement relating to Tastex's quarry operations after dissolution of the partnership because the agreement between Mr Carpenter and Mr Morris regarding Tastex's quarrying did not contain an implied term to procure an exploration or mining licence.

Held: allowing the appeal in part

- An action for money had and received may be commenced and maintained even if there is an alternative claim in equity for knowing receipt of property obtained in breach of fiduciary obligation (*Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732; [2016] NSWCA 81): [59]. Where a third-party to a partnership receives partnership income, otherwise than as a bona fide purchaser for value without notice of the defect in title, there arises an obligation to make restitution of the income received, such obligation falling within the established categories of restitutionary liability and attended by a qualifying or vitiating factor: [6], [62]-[71].

- It suffices to establish liability to make restitution in an action for money had and received that a putative defendant has received money or some other form of benefit at the plaintiff's expense, and is unnecessary for a putative plaintiff to identify through tracing specific money into the hands of a putative defendant: [2].

- There was no error in the primary judge's rejection of an implied term in the agreements asserted by the appellants that Mr Morris would procure an exploration or mining licence when necessary to facilitate Tastex's continued operation of the quarry. Such a term would be unnecessary to facilitate the reasonable and effective operation of any such contract (*Byrne v Australian Airlines Ltd* (1995) 185 CLR 410; [1995] HCA 25): [80]-[89].

Leases: option to renew; Contracts: variation and waiver

Willis Australia Ltd v AMP Capital Investors Ltd **[2023] NSWCA 158**

Decision date: 11 July 2023

Ward P, Beech-Jones JA and Griffiths AJA

In 2014, Willis (as tenant) and AMP (as landlord) entered into a lease for Suite 1 of Level 15 and the whole of Level 16 of Angel Place, 117-123 Pitt Street, Sydney. The lease was for a six year term. It included an option to renew for a further four year term, and a second option for Willis to take a lease of the balance of Level 15 for a four year term. These options could be exercised if certain conditions were fulfilled. Willis notified AMP they intended to exercise both options. Willis then withdrew its notice for the second option. AMP stated the exercise of the second option was an irrevocable offer, and Willis could not resile from its original position. Willis contested this on the basis it had not performed the final two conditions to exercise the option. The primary judge determined that Willis had exercised the second option, finding that the option was a conditional contract, and AMP had validly waived the timely performance of the conditions Willis had not performed, which were wholly for AMP's benefit.

Held: allowing the appeal

- Willis was not bound by the second option to take the lease for the balance of Level 15 as it had only exercised three of the five stipulated conditions: [70]-[71]. The text of the relevant clause and a reading of the contract as a whole did not support AMP's construction, nor did considerations of commercial nonsense or inconvenience: [71]-[81]. It was not necessary to resolve the controversy as to whether the conditions were an irrevocable offer or conditional contract: [4], [63]-[69].
- AMP could not waive the timely performance of condition 5 (the provision of a bank guarantee (there was no allegation or finding Willis had not performed condition 4)) as the performance of this condition was not a right that could be waived: [105]. Further, the explicit terms of the contract stipulated a valid waiver or variation would only follow from a waiver being in writing and signed by both parties affected by such a waiver: [107].

Limitation of Actions: personal injury; discoverability

Anderson v State of NSW; Perri v State of NSW **[2023] NSWCA 160**

Decision date: 12 July 2023

Gleeson and White JJA and Griffiths AJA

In 2011, Mr Anderson and Mr Perri, then aged 14 and 13 years old respectively, were with a group of boys on the UNSW campus in Kensington. One boy, (not one if the applicants), grabbed a mobile phone from a woman and ran off with it. Shortly after, campus security detained the applicants on suspicion of stealing the phone. They were taken to the campus "security room" and Maroubra Police Station. Mr Anderson was taken to a cell and strip searched. He was told to turn around, face the wall and squat with his hands in the air, which he complied with. He then lifted his genitals as directed. Mr Perri gave evidence to a similar effect. Following detainment for three hours, the boys were released without charge to their guardians. Proceedings were not commenced until 15 July 2021 for three causes of action: false imprisonment, assault and battery. The primary judge found that the events took place as described; the strip searches constituted an assault but did not constitute child sexual abuse within the meaning of s 6A of the *Limitation Act 1969* (NSW); the limitation period had expired for the causes of action; but if it had not, $20,000 would have been awarded in damages for false imprisonment and another $20,000 for assault . Both sums including aggravated damages but exemplary damages were not appropriate.

Held: refusing leave to appeal

- The strip searches did not constitute "child abuse" and there was no demonstrable error of law or fact in the primary judge's reasons in so finding: [32]-[33]. The extrinsic materials made it clear the reference to "sexual abuse" as part of the definition of "child abuse" in s 6A of the Limitation Act did not apply in these circumstances: [29], [32].
- The applicants' respective "capable persons" (those acting *in loco parentis*) knew or ought to have known facts (imputed to the applicants as minors) which demonstrated no error in the primary judge's finding that the applicants' claims were time barred: [48], [53].
- The primary judge's reasons disclose no error in finding the applicants' capable persons were in a position to have known or ought reasonably to have known that further legal advice should have been sought prior to the limitation period expiring: [58], [61]-[62].

Negligence: occupiers' liability

***Blue OP Partner Pty Ltd v De Roma* [2023] NSWCA 161**

Decision date: 12 July 2023

Meagher, Mitchelmore and Kirk JJA

Ms De Roma was injured when she tripped and fell while walking over a steel utility pit lid and frame set in a concrete footpath. She had been walking quickly in order to catch a bus waiting at a nearby bus stop. Blue OP was responsible for the inspection, maintenance and safety of the steel utility pit lid and frame. The primary judge found that Blue OP had breached its duty of care as 'occupier' by failing to paint lines on the utility pit's raised surface and thereby draw attention to the trip hazard it posed. His Honour also made a finding of contributory negligence on the part of the respondent, reducing damages by 20%. Blue OP appealed the finding of negligence on the basis that it had no duty to warn because the risk of tripping was an "obvious risk" within the meaning of s 5F of the *Civil Liability Act 2002* (NSW) (CLA), meaning that, by the application of s 5H(1), the appellant had no duty to warn.

Held: allowing the appeal

- The obviousness of a "risk of harm" may depend on the level of particularity with which it is described. The risk should be specified with a degree of generality, but must be precise enough to capture the harm which resulted from the risk occurring in the particular case. The risk of harm should also be characterised at the same level of generality when addressing questions of negligence and questions of obvious risk: [46], [48], [51]-[52].

- The primary judge erred in adopting a characterisation of the "risk of harm" for the purpose of determining the question of "obvious risk" that was more specific than the characterisation adopted when determining questions of duty and breach of duty. In the primary judge's former analysis, the risk was that of tripping over a raised edge of up to 1 cm in the pit lid structure, which was the precise risk that materialised. In the latter analysis, that risk was of tripping on an uneven surface created by the presence of the utility pit in the concrete footpath: [17], [45]-[46].

- When deciding whether the appellant should have warned of the risk of harm, it was necessary to consider the obviousness of that risk at a point which would have allowed a pedestrian in the respondent's position to modify her behaviour and avoid the risk. That risk was of tripping on an uneven surface created by the presence of the utility pit lid and frame within the concrete footpath: [48]-[53].

- Section 5F(1) asks whether it was obvious to a reasonable person exercising care for her safety that a risk of that kind might be present and materialise as she walked across the footpath containing the utility pit lid and frame. The obvious risk analysis should address that risk of harm from the perspective of a reasonable person in the respondent's position. It would have been obvious that there was a steel pit lid in the footpath ahead, that there may have been a gap between the lid and frame, and therefore that there were likely to be uneven surfaces within that area which presented a risk of tripping: [47], [54]-[55].

- From the perspective of a reasonable person in the respondent's position taking care for her own safety, the risk of tripping was obvious because of the fact or likely fact of an uneven surface or surfaces ahead. That was sufficient to satisfy s 5F, thereby engaging the application of s 5H(1). The appellant did not owe a duty to warn the respondent of the risk: [55], [57]-[64].

Australian Intermediate Appellate Decisions of Interest

Consumer Law: s 236(1) of the *Australian Consumer Law*

***Blu Logistics SA Pty Ltd v Flogineering Pty Ltd* [2023] FCAFC 103**

Decision date: 4 July 2023

Rares, Collier and Logan JJ

Flogineering, the respondent, had regulatory approval to sell its model of milk flow meter, which is used in dairy industry milk tankers. It also had the exclusive statutory right to certify that a flow meter, as installed, complied with the conditions of Flogineering's regulatory approval. Flogineering technicians would indicate compliance by marking meters with an "approval number". The five appellants were road hauliers, who collected milk from dairy farmers and delivered it to milk processors. Some 26 of their tankers used Flogineering milk flow meters. The meters displayed an "approval number" but were in fact not certified by a Flogineering technician. The primary judge found that, by displaying the approval numbers, the hauliers misrepresented to milk producers that they were legally entitled to collect and deliver bulk milk. The misrepresentation contravened ss 18 and 29(1)(e) and (g) of the *Australian Consumer Law* (ACL) in Sch 2 of the *Competition and Consumer Act 2010* (Cth), as the primary judge declared, before enjoining further contravention. In a later damages hearing, the judge found that Flogineering had suffered loss of $606,636, for its loss of opportunity to sell to the hauliers its exclusive right to approve its milk flow meter. The primary judge discounted this figure by 25% because, had the milk processors insisted on the hauliers obtaining compliant approval, it was possible that the hauliers would have switched from Flogineering's machines to an alternative milk-measuring instrument. The hauliers appealed the finding that Flogineering had proved it was more likely than not that one or more milk processors had checked whether the affected milk flow meters displayed an approval number and thus relied on the representation conveyed by the number. . Flogineering cross-appealed the 25% discount.

Held: dismissing the appeal but allowing the cross-appeal

- Flogineering was not required to prove that the milk processors had actually inspected one or more flow meter approval numbers. Rather, including that, because of their regulatory requirements, processors from time to time did check approval numbers, From this, the primary judge was entitled to find that it was more likely than not one of the processors had checked and therefore relied on the misleading approval numbers: r: [35]-[42].

- Flogineering's suffered the loss of the opportunity to sell its exclusive right to apply the approval number to the affected flow meters: [43].

- The initial declarations were made on the basis that the processors had relied on the misrepresentation. Once they were made, it was not necessary for Flogineering to again prove reliance in the damages hearing : [48]-[54].

- A discount of Flogineering's compensation was not appropriate because it was improbable that the hauliers would have acted any differently until the primary judge enjoined them from making the misrepresentation. The hauliers' persistence in their contraventions showed that they regarded it to be in their interests to continue with Flogineering's meters and risk that Flogineering's claim would enforce its legal rights: [64]-[65].

Limitation of Actions: adverse possession of real property

***Angelo Edward Gianchino v Victoria Elizabeth Gianchino (in Her Personal Capacity and Her Capacity as Executor of the Estate of Susan Martha Gianchino)* [2023] VSCA 162**

Decision date: 12 July 2023

Beach, Forrest and Osborn JJA

Angelo and his wife, Susan (deceased), purchased and became the registered proprietors of a property containing a house (the property). In 2004, Angelo moved to Queensland but Susan and their two children, Victoria and Ben, remained living in the property. Susan changed the locks at the property so Angelo could not enter. In 2005, some of the belongings Angelo had left at the property were sent to him by Susan and some he personally collected. From 2004, Angelo continued to make some mortgage payments until 2008. Susan died in 2019 and Angelo was registered as the sole proprietor. Victoria and Ben who still lived at the property, claimed that they were in adverse possession within the meaning of s 14(4) or (1) of the *Limitations of Actions Act 1958* (Vic). The primary judge found that, because Victoria and Ben had been in adverse possession for more than 15 years, Angelo was barred from seeking possession by s 8 of the Act.

Held: refusing leave to appeal

- Section 14(1) provides that the relevant right of action accrues when adverse possession is taken of the land, whereas s 14(4) deems adverse possession to have occurred as between joint tenants in certain circumstances: [26]. Section 14(1) states that adverse possession comprises two elements: factual possession and intention: [29]. It is not required that the intention is to acquire ownership of the land, nor is it necessary that the acts of the squatter be inconsistent with the intention of the paper owner: [37]-[38]. For the purposes of s 14(4), it is necessary to prove ouster for one co-owner to establish possessory title against the other co-owner: [41]-[43]. The effect of s 14(4) is that if one of the matters specified in the sub-section is satisfied, then this state of affairs is deemed to be adverse possession of the land: [48]. There is a positive and a negative deeming element in s 14(4): [50].

- Possession with the consent of the co-owner is not dispossession of the true owner in the required sense: [57]. By changing the locks in 2004, Susan dispossessed Angelo and took factual possession of the land: [58]. Although evidence of one co-owner's intention could potentially bear on the question of the co-owner in adverse possession's intentions, this was not the case in this matter: [66]-[69].

- The payment of mortgage instalments was not a use of the land. It did not affect the question of whether the co-owner in adverse possession possessed the land for the benefit of herself and her children: [75]. Storing Angelo's belongings in part of the garage on the land did not demonstrate that Susan took and maintained possession in part for the benefit of Angelo. The taking of exclusive possession was demonstrated by the changing of the locks in 2004 and the maintenance of exclusive control of the property thereafter. Susan took control of the remnant personal items left by Angelo in the garage and permitted Ben to destroy some of them. Returning goods and allowing Angelo to pick up goods did not demonstrate that she took possession in part for the benefit of Angelo: [82].

Asia Pacific Decision of Interest

Constitutional Law

Dr Jaya Thakur v Union of India & Ors **[2023] INSC 616**

Decision date: 11 July 2023

Court: Supreme Court of India

Hon'ble Mr. Justice B.R. Gavai, Hon'ble Mr. Justice Vikram Nath, Hon'ble Mr. Justice Sanjay Karol

The second respondent was appointed Director of Enforcement (DE) for two years. In 2020, the President of India extended the term for one year. In 2020, the Supreme Court found the extension lawful, but held any further extension would be ultra vires and issued mandamus. In 2021, the president amended the relevant legislation by ordinance, allowing extensions of one year at a time, provided the total term of appointment was under five years. Similar amendments were made to the statute regulating the office of Director of the Central Bureau of Intelligence (CBI). The DE's term was then further extended. Dr Thakur commenced judicial review proceedings under art 23 of the *Constitution*, arguing the ordinances were invalid or that, even if valid, they could not retrospectively nullify the Supreme Court's earlier order of mandamus.

Held: that the ordinances were valid, but that they could not nullify the earlier mandamus

- To declare a statute unconstitutional, it must be found beyond any iota of a doubt that the violation of the constitutional provisions was so glaring that the legislative provisions under challenge cannot stand: [70], [73]. A legislative enactment can only be struck down if the relevant legislature does not have the competence to make the law or if it takes away or abridges a constitutional right: [71], [74]. Legislation cannot be struck down merely for arbitrariness or unreasonableness: [74].
- Under the amendments, the selection process and the stringent removal process afford the two Directors strong protection from extraneous pressures a: [78]-[82], [85]-[87]. The amendments do not grant arbitrary power to the Government to extend the tenure of the Director of ED or CBI, maintaining the strong protection from extraneous pressures: [94], [97].
- It is within the legislative power to remove the basis for a prior decision of the Supreme Court. It is not within power to nullify a specific order of mandamus, as binding between the parties to the court's decision and crystallising those parties' rights inter se: [114]. To allow the legislature to overrule specific judicial orders between parties would violate the separation of powers: [114].
- A mandamus that no further extension shall be granted to the second respondent was issued in *Common Cause (A Registered Society) v Union of India & Ors* [2021] SCC 687: [100], [103], [116]. The amendments did not remove the foundation of that decision: [115]. Therefore, the orders extending the tenure were invalid: [116]-[119].

International Decision of Interest

Quincecare Duty

***Philipp v Barclays Bank UK PLC* [2023] UKSC 25**

Decision date: 12 July 2023

Court: United Kingdom Supreme Court

Lord Reed, President, Lord Hodge, Deputy President, Lord Sales, Lord Hamblen and Lord Leggatt

Mrs Philipp was a customer of Barclays Bank. She and her husband were victims of an push payment fraud which caused her to authorise the transfer of £700,000 from her Barclays Bank account to bank accounts in the UAE. Attempts to recall the funds were unsuccessful. Mrs Philipp commenced proceedings, claiming that Barclays Bank owed her a duty to refrain from executing her payment instructions if and for so long as it had reasonable grounds for believing that the instructions were an attempt to misappropriate funds from Mrs Philipp. Initially, the claim was struck out, but this was overturned on appeal. Barclays Bank appealed that decision.

Held: allowing the appeal

- In a contract with a bank, an express term is needed to establish a duty not to carry out a payment instruction given by a customer if it believes that the customer is the victim of fraud: [4], [27], [111]-[114]. If the customer's account is in credit, the ordinary duty of the bank when instructed by its customer to make a payment from the account is to carry out the instruction. In making the payment, the bank acts as the customer's agent. Its duty is strict. Unless otherwise agreed, the bank must execute the instruction promptly. It is not for the bank to determine the risks of its customer's payment decisions [3], [28]-[30].

- *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363 only applies to cases where the customer's agent, rather than the customer themselves, gives a payment instruction to the bank, because the validity of the instruction may be in doubt. If the instruction is clear, no enquiries are needed to verify what the bank is required to do. Unless otherwise expressly agreed, the bank's duty is to execute the instruction and any failure to do so will be a breach of duty by the bank [5], [100].

- Each payment was made after Mrs Philipp had visited a branch in person and given instructions to transfer the money. Before making the transfer, a representative of the Bank telephoned Mrs Philipp to confirm that she had made the transfer request and wished to proceed: [12]. Therefore, it is impossible to say that the Bank owed her a duty not to comply with her instructions [5].

- The alternative claim that the Bank breached its duty in not acting promptly to try to recall the payments made to the UAE after being notified of the fraud should not have been summarily dismissed. The questions of whether the Bank owed such a duty and whether there was any realistic chance that the money would have been recovered if attempts had been made to recall the payments sooner could not be decided without a fuller investigation of the facts: [115]-[119].