Dan Star's Federal Court Judgements

MARCH

COURTS AND APPEALS

When a significant delay between the trial and the delivery of judgment gives rise to appellable error

In *Auguste v Nikolyn Pty Ltd* [2016] FCA 1579 (23 December 2016) the Federal Court (McKerracher J) dismissed an appeal from the Federal Circuit Court of Australia (FCCA). One of the grounds of appeal from the decision of the FCCA raised whether significant delay in the delivery of judgment following trial had an operative effect of the conclusion of that judgment.

The proceeding in the FCCA was a building dispute in the form of a misleading and deceptive conduct claim. Mr Auguste brought a claim against building company Nikolyn Pty Ltd and its director in relation to plumbing works for a subdivision development on his land. The claim was in essence for damages caused by delay in construction of compliant plumbing works. The claim was dismissed by the FCCA and a significant portion of the counterclaim was allowed.

The judgment of the FCCA was delivered almost twenty-three months after the trial and five months after the FCCA stated that the judgment was anticipated to be delivered (at [58]-[59]). One of the grounds of appeal was that the conclusion of the trial judge was flawed by reason of the delay in judgment delivery (at [56](1)).

McKerracher J analysed the legal principles and authorities on excessive judgment delay at [62]-[63], in particular the reasons of the Full Federal Court in *Tattsbet Ltd v Morrow* (2015) 233 FCR 46 (Allsop CJ, Jessup J and White J). The critical question is "whether there is operative delay. That is, whether the delay can be seen as being problematic in the sense of confidence being placed in the judgment" (at [65]). Examples given of operative delay are dealing with issues on only a cursory basis or overlooking clearly critical evidence. Bare credit findings based upon impressions of a witness would be the findings most vulnerable to attack on the basis of excessive delay (such as in *Tattsbet*): see at [66]. However, McKerracher J held that none of the findings of the FCCA fell into that category (at [67]).

Further the Court held at [78] that: "Notwithstanding the delay, the reasons demonstrate that his Honour considered all of the evidence, such that it is clear that no delay had an operative effect on the conclusion reached to dismiss Mr Auguste's claim and allow the cross-claim."

The remaining grounds of appeal in relation to misleading and deceptive conduct and other matters also failed.

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CONSUMER LAW

Unconscionable conduct under the Competition and Consumer Act 2010

In *Australian Competition and Consumer Commission v Woolworths Limited* [2016] FCA 1472 (8 December 2016), the Federal Court (Yates J) dismissed the ACCC's claim of unconscionable conduct against Woolworths.

The proceedings concerned whether Woolworths engaged in trade or commerce in conduct in connection with the acquisition or possible acquisition of goods from its suppliers that was, in all the circumstances, unconscionable and in breach of s 21(1) of the *Australian Consumer Law* (ACL), which is Schedule 2 to the *Competition and Consumer Act 2010* (Cth).

The ACCC alleged that the design and implementation of Woolworths' 'Mind the Gap' scheme (Scheme) was unconscionable. Under the Scheme, Woolworths sought payments from certain suppliers who had underperformed for a certain period relative to the previous corresponding period according to certain metrics. The aim was to improve the gross profit position of Woolworths and bridge the gap between Woolworths' targeted and expected profits (at [90]). As things transpired, the Scheme raised more than $18m.

The ACCC's case was documentary and it called no witnesses. The ACCC did not call any evidence from any supplier affected by the Scheme (at [8]-[9]). Woolworths called evidence from witnesses such as its relevant director and managers (at [11]-[17]). Woolworths (but not the ACCC) called evidence on the commercial dynamics of supermarket businesses (at [33]). Woolworths' evidence illustrated that while the Scheme was a coordinated approach to seeking payments from suppliers in December 2014, the individual approaches made at that time were no different in character to the approaches typically made to individual suppliers at other times in the normal course of Woolworths' trading relationship with those suppliers (at [43]). Further, "the 'asks' made as part of the [Scheme] were instances of the normal commercial negotiations that category managers and buyers routinely enter into with suppliers albeit that the [Scheme] was a focused and coordinated approach to suppliers in a particular period … that was targeted to improving, by one means, Woolworths' financial performance …" (at [118]).

The ACCC's pleaded case was that Woolworths' systematic conduct in implementing the Scheme was unconscionable (at [124]). The focus of the ACCC's case was the design and implementation of the Scheme. Its case was not that Woolworths engaged in particular conduct with regard to one or more particular suppliers that was unconscionable in all the circumstances concerning those particular suppliers (at [126]). Justice Yates distinguished the conduct in issue in *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 (Gordon J) which concerned specific conduct directed to certain suppliers in the course of seeking payments that was alleged, admitted and found to be unconscionable (at [127]; see also [143]-[149] and [244]).

The Court considered the meaning of 'unconscionable' in s 21(1) of the ACL by reference to relevant cases (see from [129]). Having done so, Yates J said at [142] that "… the characterisation of conduct, in trade or commerce, as 'unconscionable' is not arrived at by a process of personal intuitive assertions or idiosyncratic notions of commercial morality. The characterisation of the conduct in issue is plainly informed by fact-finding concerning the nature of the relationships involved, by which the relevant norms are to be identified. Woolworths called evidence on this subject, and its witnesses were cross-examined. The ACCC called no such evidence."

Ultimately in its consideration of the case against Woolworths, the Court rejected the many propositions relied by the ACCC to make its case of unconscionable conduct (at [191]-[262]). Justice Yates concluded at [263] that "It may be that some would see Woolworths' conduct in making 'asks' and seeking 'payments' as unjustified, unfair or unjust according to their own standards of commercial propriety. This, however, is not the proscriptive standard that s 21(1) of the ACL imposes. I hasten to add that I have made no such evaluation myself. I mention these matters only to distinguish the task of the Court from the casual and informal judgments made by others. My task has been to consider the nature of the case that has been pleaded, the evidence that has been adduced, and the legal requirements of s 21 read in light of s 22(2) of the ACL and the authorities describing the operation of these, and like, provisions."

INDUSTRIAL LAW

Penalty for breach of the *Fair Work Act 2009* – Whether Court has power to order another person not to indemnify the contravenor against his or her liability to pay the penalty

In *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner* [2016] FCAFC 184 (21 December 2016), the Full Court upheld the appeal in part.

At first instance the Construction, Forestry, Mining and Energy Union (CFMEU) and Joe Myles ultimately admitted liability for contravention of s 348 [intent to coerce] of the Fair Work Act 2009 (FW Act). Orders were made imposing penalties on both the CFMEU and Mr Myles. In addition, the primary judge (Mortimer J) made the following (Order 13):

"The [CFMEU] must not directly or indirectly indemnify [Mr Myles] against the penalties in paragraphs 9 and 10 above in whole or in part, whether by agreement, or by making a payment to the Commonwealth, or by making any other payment or reimbursement, or howsoever otherwise."

The Full Court set aside Order 13, holding that there was no statutory foundation for it (Allsop CJ and Jessup J in separate judgments, North J agreeing with both). The Full Court held that s 545(1) of the FW Act, which was the only source of power relied upon by the primary judge, did not authorise Order 13 (at [15], [26] and [66]). Among many other matters, the Court observed that if s 545(1) provided power to authorise Order 13, it would also be a source to make orders preventing anyone from assisting contraveners to meet penalty payments. Such intrusion into personal freedoms requires clear statutory power (at [13] and [61]).

The Full Court also upheld the ground of appeal that the primary judge denied natural justice to the CFMEU in relation to its use of a financial report which had been tendered for limited purposes but was used by the primary judge for another purpose not stated at trial without warning to the CFMEU (at [17], [28] and [75]-[85]).

Other grounds of appeal were dismissed. There was no breach of natural justice by the primary judge's finding that the union engaged in a deliberate strategy of defending knowingly unlawful action and eventually capitulating when the time is right (at [18], [29] and [92]-[97]). It was open to the primary judge to give minimal weight to the CFMEU's admissions (at [19], [29] and [104]-[105]). The primary judge's discretion did not miscarry in relation to the significant quantum of the penalty imposed on Mr Myles (at [20]-[21], [30] and [121]-[128].

APRIL

CONSUMER LAW

Approach to the meaning of statutory unconscionable conduct – Whether knowledge of officers and employees can be aggregated and attributed to a corporation to find the corporation acted unconscionably

Commonwealth Bank of Australia v Kojic [2016] FCAFC 186 (21 December 2016) was an appeal from orders that the Commonwealth Bank of Australia (the Bank) pay damages consequent upon a conclusion that the Bank had engaged in conduct that was unconscionable contrary to ss 51AB and 51AC of the *Trade Practices Act 1974* (Cth) (the TPA). The Full Court (Allsop CJ, Besanko J and Edelman J) allowed the appeal.

The primary judge (Mansfield J) found the Bank liable for unconscionability under the TPA in relation to a mortgage over property (and borrowings) in which Kojic purchased a half interest. The conclusion of the primary judge rested on the aggregation of the knowledge of two of the Bank's officers. The primary judge held that although no individual of the Bank had acted unconscionably within the meaning of ss 51AB and 51AC of the TPA, the Bank had acted unconscionably because the knowledge of two of its officers could be aggregated and then attributed to the Bank.

The Full Court held that the primary judge erred in aggregating knowledge of the Bank's officers. Justice Edelman gave the leading judgment on this issue (with whom Allsop CJ generally agreed at [62] and [65], as did Besanko J at [78] and [81], subject to some of their own comments).

Relevantly, Edelman J held that the primary judge's decision to aggregate the knowledge of the two Bank employees rested upon a misunderstanding of the decision of the High Court in *Krakowski v Eurolynx Properties Limited* (1995) 183 CLR 563 (*Krakowski*). The decision in received detailed consideration by Edelman J (at [119]-[142]). Justice Edelman canvassed subsequent cases in which Australian courts have correctly and incorrectly applied the majority decision in *Krakowski* (at [143]-[149]). In concluding, Edelman J stated at [153]: "Although this is not such a case, it is possible that there could be examples where a corporation acts unconscionably even though no individual has acted unconscionably. For instance, in a case where no individual has the knowledge required to establish wrongdoing, it might be difficult for a corporation to avoid a finding that it has acted unconscionably if it puts into place procedures intended to ensure that no particular individual could have the requisite knowledge. The same might be true if a corporation's procedures were such that those formulating them were reckless about serious consequences ..."

In addition, the Full Court disagreed with the primary judge's conclusion that the Bank acted unconscionably even if one combined the knowledge of the Bank's officers as the primary judge did. On this aspect of the appeal, Allsop CJ gave the leading judgment and examined the meaning of unconscionable conduct in the statutory sense (at [53]-[61]; with whom Besanko J agreed at [71] and Edelman J agreed at [84]-[85]). The task is not limited to finding 'moral obloquy' or some other synonymous definition or rule. In summary, there is an evaulaution based on the notion of business conscience according to legislative norms and values and made against as assessment of the circumstances. Chief Justice Allsop examined the evaluation process by reference to his earlier judgment in Paciocco v ANZ Banking Group Ltd (2015) 236 FCR 199 (which at [55] in Kojic he noted was regarded as correct by certain members of the High Court in Paciocco v ANZ Banking Group Ltd [2016] HCA 28).

BANKRUPTCY AND INSOLVENCY

Appeal against making of a sequestration order – Whether hearing of the creditor's petition ought to have been adjourned

In *Culleton v Balwyn Nominees Pty Ltd* [2017] FCAFC 8 (3 February 2017) the Full Court (Allsop CJ, Dowsett J and Besanko J) dismissed an appeal against a sequestration order made against the appellant's estate under s 43 of the *Bankruptcy Act 1966* (Cth).

The appeal raised various grounds of appeal, all of which were dismissed by the Full Court. Of general interest were the grounds that the primary judge (Barker J) erred by failing to grant an adjournment of the creditor's petition.

Before the primary judge, the appellant as a self-represented litigant requested the adjournment in order to obtain legal representation for the purpose of establishing that the bankruptcy proceedings constituted an abuse of process. The adjournment was refused and this argument was not seriously pursued on appeal. Rather, the appellant (who was legally represented in the appeal) argued that the primary judge should have granted an adjournment in order to allow him to obtain legal representation for the purposes of proving his solvency.

Accordingly, the Full Court referred to the principles relevant to determination of an adjournment application in the context of the hearing of a creditor's petition and on appeal of such a discretionary decision (at [35]-[39]). In considering the question of an adjournment of the hearing of a creditor's petition, the Court observed that it is fundamental to keep firmly in mind the public interest nature of bankruptcy jurisdiction (at [40]).

After citing authorites demonstrating the centrality of the question of solvency to the jurisdiction of bankruptcy, the Full Court said at [45]: "The centrality of the question of solvency or insolvency might, in a given case, be why an adjournment is not granted when solvency is asserted. If material before the Court gives rise to the inference that further time to prove solvency is unlikely to be of utility, there may be a risk of further prejudice to creditors generally if there is delay in making the order. On the other hand, if the evidence reveals the real possibility that there is further material that may prove the debtor is solvent, attention should generally be given to the question whether some time or opportunity should be afforded to the debtor. Whether it is afforded will depend upon all the circumstances."

The appellant's request for an adjournment was raised in the context of (but not as the requested reason for) the adjournment (at [47]). The question of the appellant's solvency was not an abstruse legal issue and the facts concerning it were likely to have been known by the appellant (at [49]). The Full Court held that there was no error in the primary judge's view that the material did not warrant an adjournment (at [53]).

More generally, the Full Court stated at [52]: "Section 37M makes clear that a central consideration to the overarching purpose is the just determination of proceedings. The just determination of a creditor's petition requires solvency to be addressed if the issue is raised on the material before the Court. If an adjournment is sought to obtain legal representation in order to help substantiate an assertion of solvency that has some bona fide and real basis, consideration should be given to the legitimacy and utility of time and legal assistance for proof of that matter. This is not to fetter any approach. It is not to pander to recalcitrant debtors. It is not to say any assertion will lead to an adjournment. Each case must be dealt with on its merits. But it is to be recognised that insolvency, not judgment execution or debt collection, is the essence of an application for a sequestration order. An assertion of solvency with some real and bona fide foundation is not a collateral question. It goes to the heart of the jurisdiction; though it is for the debtor to prove: s 52(2)(a). How a judicial officer deals with a request for more time to prove solvency will depend on the circumstances of the particular case. But it should be approached recognising the importance of the question to the exercise of the Court's jurisdiction."

ADMINISTRATIVE LAW AND MIGRATION LAW

Procedural fairness – Requirement to inform applicant of critical importance of his employability as affected by his disability

In *BRK15 v Minister for Immigration and Border Protection* [2016] FCA 1570 (22 December 2016) the Court (Gilmour J) held that the decision of the Assistant Minister for Immigration and Border Protection (the Minister) under s 501(1) of the *Migration Act 1958* (Cth) to refuse to grant the applicant a protection visa application constituted a denial of procedural fairness and jurisdictional error.

The Minister's decision under s 501(1) was based on the view that the applicant's criminal history, limited personal support and disability reduced his employment prospects leading to an unacceptable risk of reoffending. Prior to denying the application, the Department of Immigration and Border Protection (the Department) afforded the applicant the opportunity to disclose any information that may be relevant to deciding whether to grant a protection visa. In this regard, a letter from the Department specifically mentioned that information concerning the applicant's disability might be appropriate.

The Court held that the Department's request for information was insufficient to afford him procedural fairness (at [47]). The applicant was not to know that the Minister would connect "in the central and critical way she did" information concerning his disability and the risk of his reoffending. In this context, Gilmour J commented that procedural fairness requires a decision maker to "advise of any adverse conclusion which would not obviously be open on the known material" (at [48]).

A different ground for judicial review, which was rejected, concerned the Minister's consideration (or lack thereof) of the provisions of the *Disability Discrimination Act 1992* (Cth) on his employability. However, those provisions were not mandatory relevant considerations (in the *Peko-Wallsend* sense) such that the Minister was obliged to take them into account under s 501(1) of the *Migration Act 1958* (Cth) (at [33]).

MAY

ADMINISTRATIVE LAW

Whether s 33 of the Acts Interpretation Act 1901 (Cth) authorised revocation of administrative decision – Whether the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) evinced a contrary intention preventing revocation of a decision

Minister for Indigenous Affairs v MJD Foundation Limited [2017] FCAFC 37 (3 March 2017) concerned the interaction between s 33 of the *Acts Interpretation Act 1901* (Cth) (*the Acts Interpretation Act*) and s 64(4) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the *Land Rights Act*). Section 33(1) of the *Acts Interpretation Act* provides that: "Where an Act confers a power or function or imposes a duty, then the power may be exercised and the function or duty must be performed from time to time as occasion requires."

There were two core issues before the Full Court (Perram, Mortimer J and Perry JJ). The first was whether s 33(1) of the *Acts Interpretation Act* empowered the incoming Minister to revoke the earlier decision of a former Minister under s 64(4) of the *Land Rights Act*. The second issue was whether the scheme provided by the *Land Rights Act* evinced a 'contrary intention' for the purposes of s 2(2) of the *Acts Interpretation Act* to displace any powers of revocation that may be conferred by s 33(1).

Justice Mortimer (with whom Perry J agreed) held that there was a contrary intention evinced by the scheme of the *Land Rights Act* as a whole (and Pt VI of the Act, in which s 64(4) is contained, in particular), so that s 33(1) of the *Acts Interpretation Act* was not applicable. That was a sufficient basis on which to determine the appeal. However, had her Honour not been satisfied of the existence of a contrary intention, in Mortimer J's opinion, the scope of s 33(1) of the *Acts Interpretation Act* did not extend to a general implication of an additional power to reverse or undo an exercise of power, whether by revoking a decision made in the exercise of a power or otherwise (at [110]).

Justice Perram dissented and held s 33(1) did authorise the incoming Minister to revoke the former Minister's direction, and the scheme of the *Land Rights Act* did not evince a contrary intention for the purposes of s 2(2) of the *Acts Interpretation Act* (at [5]).

INDUSTRIAL LAW

Intention to coerce under ss 343 and 348 of the *Fair Work Act 2009* (Cth) – Tort of intentionally procuring a breach of contract – Meaning of illegitimate for conduct that is unlawful, unconscionable or illegitimate

In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (CFMEU) [2017] FCA 157 (24 February 2017) the Court (Reeves J) found the Construction, Forestry, Mining and Energy Union (the CFMEU) to have breached ss 343 and 348 of the *Fair Work Act 2009* (Cth) (the FW Act).

The case concerned a series of twice-daily, two hour CFMEU meetings at the construction site for the Carrara Sports and Recreation Centre on the Gold Coast in Queensland between 9 May 2016 and 1 June 2016. The applicant's case was that the CFMEU and two of its officials arranged the meetings in order to coerce the managing contractor to enter into an enterprise agreement with it.

The CFMEU and its relevant union official did not give evidence (at [43]). The effect of the reverse onus presumption in s 361 of the FW Act was in issue. In accordance with previous authority, Reeves J agreed that s 361 applied equally to the expression 'intention to coerce' in ss 348 and 343 of the FW Act (at [43]). Further, Reeves J rejected the CFMEU's argument that the presumption in s 361 only applied to the 'intention' element but that the applicant was still required to prove the other element (namely that its conduct in organising, or taking the action of calling and conducting, the union meeting was unlawful, illegitimate or unconscionable) (at [51]). The practical consequences of this conclusion included that "while s 361 does not relieve the Commissioner from proving on the balance of probabilities each of the three elements of the contravention of s 343 … the allegations in the amended statement of claim … will stand as sufficient proof of those matters unless the CFMEU proves otherwise" (at [52]). Therefore, in this case it was the CFMEU that needed to establish that its conduct was not unlawful, unconscionable or illegitimate (at [104]).

The Court did not find the CFMEU to have acted unconscionably (at [105]).

The applicant argued that the CFMEU's conduct was unlawful in various respects but the Court accepted this submission on one basis only (at [106]). Justice Reeves found that the CFMEU had intentionally procured a breach of contract since the meetings diverted the subcontractor's employees ultimately preventing them from fulfilling their obligations to the managing contractor (at [121]-[126]). It followed that its conduct was unlawful and, having regard to s 361, the CFMEU has failed to