Andrew Yuile's High Court Judgements

JUNE

CONTRACT LAW

Construction of contracts – Commercial purposes and commercial sense

In *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12 (29 March 2017) the appellant lessor had attempted to sell to the respondent lessee a parcel of land. The sale fell through due to planning restrictions. Instead, the parties decided to enter into a 99 year lease. The rent was paid up front, in the same amount as the intended sale price. In dispute was a clause requiring the lessee to "pay all rates taxes assessments and outgoings whatsoever which during the said term shall be payable by the tenant in respect of the said premises." Also important was a clause acknowledging that it had been the intention of the parties to have transferred ownership of the land. The appellant sought a declaration that the respondent was required to pay all imposts relating to the land. The respondent argued that it was obliged to pay only those imposts levied on it in its capacity as the tenant, with the lessor to pay the balance as the owner of the land. The judge at first instance made the declaration; the Court of Appeal, by majority, reversed that decision. The High Court acknowledged that the clause was poorly drafted and could be read as supporting either position. That ambiguity allowed for consideration of words struck out of the contract. Ultimately, the key question was which construction made (more) commercial sense. That required consideration of what the reasonable businessman would have understood the contract clauses to mean. The Court held that, in the circumstances, the lease was intended to be as close to a sale as possible. As such, it made no commercial sense for the lessor to remain liable for payments of rates, taxes and other such outgoings. The respondent lessee was therefore required to pay all imposts, as if it was the owner of the land. Kiefel, Bell, and Gordon JJ jointly; Gageler J separately concurring; Nettle J dissenting. Appeal from the Court of Appeal (Vic) allowed.

ADVOCATES' IMMUNITY

Tort – Negligence – Legal practitioners – Advocates' immunity from suit

In *Kendirjian v Lepore* [2017] HCA 13 (29 March 2017) the High Court affirmed its recent decision in *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 331 ALR 1 (*Attwells*) in respect of advocates' immunity and advice regarding compromise of litigation. The appellant brought proceedings relating to an injury arising from a car accident. An offer of compromise was made by the driver of $600 000 plus costs. The offer was rejected. At trial, the appellant was awarded $308 435.75 plus costs. The appellant sued his solicitor and barrister for negligently advising him that the offer was too low (without telling him the amount) and for rejecting the offer without express instructions from him. The respondents both pleaded substantive defences, but also sought summary judgment on the basis of advocates' immunity. That application succeeded at first instance and on appeal, pre-*Attwells*. After *Attwells*, consent orders were made allowing an appeal to the High Court in respect of the first respondent. The second respondent argued that *Attwells* could be distinguished or should be set aside. The High Court unanimously rejected both arguments. *Attwells* stated that advocates' immunity exists, but only for work done in court or work done out of court that "leads to a decision affecting the conduct of a case in court" or, put another way, work "intimately connected with" work in a court. Advice regarding compromises (for or against) is not sufficiently connected with work in court to attract the immunity. Such advice does not attach to exercises of judicial power quelling controversies and cannot lead to a collateral attack on an exercise of judicial power. There is no functional connection between the advocate's work and the determination of the case. Accordingly, no immunity applied to the allegedly negligent advice of the respondents in this case. Further, there was no reason to reopen *Attwells*. Edelman J; Kiefel CJ, Bell J, Gageler J, Keane J, Nettle J and Gordon J each concurring separately. Appeal from the Court of Appeal (NSW) allowed.

CONSTITUTIONAL LAW

Parliamentary elections – Pecuniary interests – Capability of being chosen as a senator

In *Re Day* [No 2] [2017] HCA 14 (5 April 2017) the High Court held that Senator Robert Day was incapable of being chosen or sitting as a senator of the Commonwealth Parliament because of s 44(v) of the Constitution, and that Senator Day's seat is to be filled by a special count of ballot papers. Section 44(v) provides that a person shall be incapable of being chosen or sitting as a senator if they have "any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth", subject to an exception for shareholders of companies with more than 25 members. The pecuniary interest at issue arose from a lease entered into by the Commonwealth for Mr Day's electoral office. The property leased was owned by Fullarton Investments, as trustee for the Fullarton Road Trust. The Day Family Trust was a beneficiary of the Fullarton Road Trust. Mr Day was a beneficiary of the Day Family Trust and had been (before his election) the sole director and shareholder of the trustee of the Day Family Trust. In addition, Fullarton Investments directed that the Commonwealth pay the rent for the lease to an account in the name of 'Fullarton Nominees', a business name owned by Mr Day. Mr Day was, in reality, the holder of that bank account. Mr Day was also a guarantor of a related loan facility. Mr Day argued, by reference to a decision of Barwick CJ in *In re Webster* (1975) 132 CLR 270, that the purpose of s 44(v) was narrow – to prevent agreements between members of Parliament and the Crown, to secure the freedom and independence of the Crown. The Attorney-General for the Commonwealth argued for a broader purpose, including preventing parliamentarians taking advantage of their position to obtain financial advantage and to prevent conflicts of interest. The Court held that Webster should not be followed. The purpose was broader than merely agreements with the Crown. That followed from the language of the provision as well as from the history of the drafting and comparing historical antecedents. The purpose of s 44(v) is to prevent members from benefiting from agreements with the Commonwealth and to prevent conflicts of interest, as well as preventing the possibility of the Commonwealth exerting undue influence over members of Parliament. The Court held that, by receiving the rent, Mr Day had an expectation of a pecuniary interest amounting to an indirect benefit within s 44(v). It was also possible that his other interests would suffice. Consequently, he was not eligible to be chosen or to sit as a senator at least from 26 February 2016 (when Fullarton Investments gave its direction about the rent). To fill the vacancy, the Court held that a special count of the ballot papers should be undertaken. Kiefel CJ, Bell and Edelman JJ jointly; Gageler J and Keane J separately concurring; Nettle and Gordon JJ jointly concurring. Answers to questions referred to the Court of Disputed Returns given.

JULY

CRIMINAL LAW

Meaning of 'inflicted' where accused caused contraction of disease – recklessness and foresight of risk

In *Aubrey v The Queen* [2017] HCA 18 (10 May 2017) the appellant had unprotected sex with the complainant when the appellant knew he was HIV positive. The complainant was infected with HIV. The appellant was convicted on an alternative charge of maliciously inflicting grievous bodily harm on the complainant, contrary to s 35(1)(b) of the *Crimes Act* (NSW). There were two questions for the High Court. First, whether causing the contraction of a disease can come within 'infliction' of harm. And second, whether recklessness, fulfilling the mental element of malice, was satisfied if the appellant foresaw the possibility, as opposed to the probability, of the contraction of the disease. On the first question, the High Court held that the decision in *R v Clarence* (1888) 22 QBD 23 should not be followed. For several reasons, including developments in English authorities since, the infliction of harm does not require a direct or immediate application of force resulting in injury. Just as "infliction" can encompass psychological injury, it can encompass actions that result in the transmission of a serious infectious disease to a person who is ignorant of the accused's condition. (Legislative changes after the events in this case also confirm that position.) On the second question, the Court held that the level of foresight required to fulfil recklessness can depend on the circumstances of the crime, in the sense that reasonableness of an action and degree of foresight of harm are connected. In this case, it was sufficient for the Crown to make out the foresight of the bare possibility of harm. Kiefel CJ, Keane, Nettle and Edelman JJ jointly; Bell J dissenting. Appeal from the Court of Appeal (NSW) dismissed.

CRIMINAL LAW

Justification and excuse – Manslaughter – Criminal responsibility

In *Pickering v The Queen* [2017] HCA 17 (3 May 2017) the appellant was acquitted of murder but convicted of manslaughter. Section 31(1) of the *Criminal Code* (Qld) provided that a person is not criminally liable for an act if the act is reasonably necessary to resist actual and unlawful violence. Section 31(2) removes that dispensation for an act that would constitute the crime of murder or an offence of which grievous bodily harm to the person of another is an element. The jury was instructed to consider manslaughter if they acquitted of murder, but were not directed to consider s 31. The Court of Appeal upheld that result, reasoning that s 31(2) encompassed any offence for which an element is grievous bodily harm, even if the offence was not charged. The High Court held that s 31(2) directs attention to the offence or offences with which a person has been charged. The relevant 'act' is the physical act, rather than the consequence of it (here, the stabbing rather than the physical harm). Section 31 is not concerned with the quality of such acts. The inquiry is whether the offence in question is murder or an offence of which grievous bodily harm is an element. Manslaughter is not such an offence. As it was admitted that there was evidence going to the s 31 defence and that the outcome might have been different if the jury had been instructed differently, the appeal had to be allowed and a retrial ordered. Kiefel CJ and Nettle J jointly; Gageler, Gordon and Edelman JJ jointly, concurring. Appeal from the Court of Appeal (Qld) allowed.

MIGRATION LAW

Power to detain – Transfer for temporary purposes – Duration of detention

In *Plaintiff M96A/2016 v Commonwealth* [2017] HCA 16 (3 May 2017) the High Court upheld the validity of provisions of the *Migration Act 1958* (Cth) allowing for the temporary detention of 'transitory persons' in Australia. The plaintiffs arrived on Christmas Island and were subsequently removed to Nauru. They were brought to Australia pursuant to s 198B for the temporary purpose of having medical treatment and were therefore 'transitory persons'. They were detained in onshore detention centres and, subsequently, in community detention. Sections 198AD and 198 require that transitory persons be removed, as soon as reasonably practicable, once they no longer need to be in Australia for the temporary purpose. Section 189 requires that unlawful non-citizens, including transitory persons, be detained until they are removed or the Minister allows them to apply for a visa. The High Court has previously held to be valid the detention of non-citizens for the purposes of removal, determination of a visa application or consideration of whether to allow an application for a visa. The plaintiffs in this case argued that their detention was invalid because it was not for one of those purposes and the duration of the detention was not objectively determinable. The High Court rejected those arguments. The Court held that the purpose of detention remained the subsequent removal of the plaintiffs; that is, once the temporary purpose for their being in Australia was finished. Further, the Court held that it is the criteria for detention, and not the duration of detention, that must be objectively determinable. The relevant criteria fulfilled that requirement in this case. Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ jointly; Gageler J separately concurring. Proceeding on demurrer dismissed.

CRIMINAL LAW

Fault element – Intention – Application of inferential reasoning

In *Smith v The Queen*; *The Queen v Afford* [2017] HCA 19 (10 May 2017), the High Court held that the process of inferential reasoning from *Bahri Kural v The Queen* (1987) 162 CLR 502 is applicable to proof of an intention to import a border controlled substance contrary to s 307.1(1) of the *Criminal Code* (Cth). Smith was convicted of importing a commercial quantity of illicit drugs, secreted in golf sets, shoes, vitamins and soap. Afford was also convicted of importing drugs, secreted in the lining of his suitcase and laptop bag. In both cases, a key issue at trial was whether the accused intended to import a substance. Under the Code, that required the accused to have meant to import the substance. In *Kural*, the Court upheld a process of reasoning by which it could be inferred that the accused meant to import the substance. Smith and Afford argued that the reasoning in *Kural* could not be applied to s 307.1 of the Code. Each argued that the jury directions were inadequate based largely on this argument. Afford also argued that his conviction was unsafe. The Court held that the *Kural* reasoning could be applied to the Code. If it can be established that an accused perceived there to be a real or significant chance of a substance being in an object that they brought into Australia, it is open to infer from all the facts and circumstances of the case that they intended to import the substance. The Court also gave examples of how that inference might be drawn and the distinction between inference and recklessness. The Court further held that the jury directions were sufficient, unanimously in the Smith case and by majority in the Afford case. The plurality also gave an example of how directions on this point might be structured. These conclusions meant that the appeal in Smith was dismissed and the appeal in Afford was allowed. Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ jointly; Edelman J separately, dissenting in relation to the Afford directions and otherwise concurring. Appeal from the Court of Criminal Appeal (NSW) dismissed (Smith); Appeal from the Court of Appeal (Vic) allowed (Afford).

PROCEDURE

Enforcement of Australian judgment overseas – Operation of Bankruptcy Act

In *Talacko v Bennett* [2017] HCA 15 (3 May 2017) the High Court held that s 58(3) of the *Bankruptcy Act 1966* (Cth) acted as a 'stay' within the meaning of s 15(2) of the *Foreign Judgments Act 1991* (Cth), meaning that a certificate of finality under the *Foreign Judgments Act* could not be issued. After extensive litigation, the respondents obtained judgment against the appellant in the Victorian Supreme Court for more than 10m Euros. The appellant was subsequently made bankrupt by order of the Federal Court. The respondents sought from the Prothonotary of the Supreme Court a certificate of finality under the *Foreign Judgments Act*. They intended to file the certificate in proceedings against the appellant on foot in the Czech Republic. However, s 15(2) of the Foreign Judgments Act provided that an application for a certificate could not be made until the "expiration of any stay of enforcement of the judgment in question". Section 58(3) of the Bankruptcy Act relevantly provides that it is not competent for a creditor to enforce a remedy against a person or the property of a bankrupt in respect of a provable debt after the debtor has become bankrupt. The question was whether s 58(3) operated as a 'stay' for the purposes of s 15(2) of the Foreign Judgments Act. The High Court held that a 'stay' was not limited to a court order. It is capable of including any legal impediment, including statutory barriers, to execution upon the judgment. The purpose of s 15(2) is to prevent the issue of certificates that would facilitate the enforcement overseas of a judgment not enforceable in Australia. The effect of s 58(3) is to preclude a creditor from enforcing a remedy against the person or property of a bankrupt. It would elevate substance over form and undermine s 58(3) to interpret its effect as falling outside s 15(2). Kiefel CJ, Bell, Keane, Gordon and Edelman JJ jointly; Gageler J and Nettle J separately concurring. Appeal from the Court of Appeal (Vic) allowed.

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