online betting accounts and the use made of them by the appellant's counsel. The appellant was convicted. He appealed his conviction arguing that the summing up occasioned a miscarriage of justice. A majority of the Court of Criminal Appeal dismissed that appeal. The High Court held that the summing up was "so lacking in balance as to be seen as an exercise in persuading the jury of the appellant's guilt. The statements were unfair to the appellant and gave rise to a miscarriage of justice". The Court said that while a trial judge has a discretion to comment on facts, it "should be exercised with circumspection". Comments should be limited to what is necessary to help the jury with a fair and accurate statement of the case presented by each party. They should not contain the judge's opinion of the proper determination of a disputed fact. Bell, Keane, Gordon and Edelman JJ; Gageler J separately concurring. Appeal from the Court of Criminal Appeal (NSW) allowed. ■

Information

Andrew Yuile is a Victorian barrister, telephone (03) 9225 7222, email ayuile@vicbar.com.au. The full version of these judgments can be found at www.austlii.edu.au.

Federal Court Judgments

DAN STAR QC Senior Counsel, Victorian Bar

APRIL

Administrative and constitutional law

Seeking access to correspondence between former Governor-General, Sir John Kerr and The Queen

The subject-matter of the litigation in ***Hocking v Director-General of the National Archives of Australia*** [2019] FCAFC 12 (8 February 2019) were originals of correspondence received by, and contemporaneously made copies of correspondence sent by, the former Governor-General, Sir John Kerr, or his Official Secretary, to and from The Queen by means of Her Private Secretary. It was an agreed fact that the records comprised letters and telegrams and certain attachments to that correspondence (such as newspaper clippings and letters). The period of the correspondence was 15 August 1974 to 5 December 1977, that is leading up to and after the dismissal of Gough Whitlam as Prime Minister of Australia. Further agreed facts were that the documents were deposited by Mr David Smith, in his capacity as Official Secretary to the Governor-General with the National Archives of Australia with an instruction that they were to remain closed until after 8 December 2037 (that is, 60 years after the end of the Sir John Kerr's appointment as Governor-General (at [42]-[43]).

The trial judge dismissed the appellant's proceeding seeking judicial review of a decision to deny access to the documents under Division 3 of Part 5 of the *Archives Act 1983* (Cth).

Both the trial judge and the Full Court did not examine the records in question. As Allsop CJ and Robertson J explained at [8]: "The proceedings concern only the legal correctness of the decision of the Archives that the records were not a 'Commonwealth record' as defined in s3(1) of the *Archives Act* on the basis that the records were not 'the property of the Commonwealth'. The proceedings do not concern whether the records should be made available as a matter of public interest or whether or not a ground of exemption under s33 could be made out. It is clear that the records relate to the history and government of Australia".

The Chief Justice and Robertson J dismissed the appeal (at [84]-[107]). Justice Flick dissented, stating at [110]: "It is with great diffidence that concurrence cannot be expressed with the conclusions reached by the primary Judge or the majority. The conclusion of the majority that these documents 'remain … the property of the person then holding the office of Governor-General and not the property of the Commonwealth' (at para [102]) is, with great respect, a conclusion which is not self-evidently correct. It is, with respect, difficult to conceive of documents which are more clearly 'Commonwealth records' and documents which are not 'personal' property. The documents include →

correspondence between a former Governor-General of this country, written in his capacity as Governor-General, to the Queen of Australia in her capacity as Queen of Australia, concerning 'political happenings' going to the very core of the democratic processes of this country".

Consumer law

Meaning of good faith in the unwritten law – cl6 of the Franchising Code of Conduct

In ***Australian Competition and Consumer Competition v Geowash Pty Ltd*** (Subject to a Deed of Company Arrangement) (No 3) [2019] FCA 72 (8 February 2019), Colvin J held that the respondent, a company offering carwash franchises, engaged in misleading conduct (ss18 and 29(1)(h) of the Australian Consumer Law (ACL)) and unconscionable conduct (s21 of the ACL). Further, the Court held that the respondent did not act in good faith towards franchisees in contravention of cl 6 of the Franchising Code of Conduct (Code). It is a contravention of s51ACB of the *Competition and Consumer Act 2010* (Cth) to contravene the Code.

Of particular interest is the Court's analysis of what is the nature and extent of the relevant obligation under the Code to act towards the franchisees with good faith. Clause 6(1) of the Code states: "Each party to a franchise agreement must act towards another party with good faith, within the meaning of the unwritten law from time to time, in respect of any matter arising under or in relation to: (a) the agreement; and (b) this code".

As the Court noted at [688], the cl 6 good faith obligation applies in all instances and the unwritten law is deployed to give meaning to the term 'good faith', but is not to govern whether there is a good faith obligation. The Court considered the extrinsic materials underlying cl 6 of the Code (at [697]-[706]) and the case law on the unwritten law as to good faith in contractual dealings (at [706]-[721]). The latter involved an analysis of the cases of Renard Constructions; Alacatel; Garry Rogers Motors; Burger King, Topseal Concrete Services; Overlook Management; Macquarie International Health Clinic; Strzelecki Holdings; Paciocco; YUM! Restaurants; and Ultra Tune ([722]-[746]). After doing so, Colvin J summarised the current state of the unwritten law as to the meaning of good faith for the purposes of cl 6(1) of the Code at [746] as follows:

"(1) the term 'good faith' imports a normative standard to be observed by the parties in dealings as to matters to which the standard is applied;

(2) the normative standard embraces an obligation to act honestly and with fidelity to the bargain concluded between the parties;

(3) the normative standard also embraces an obligation to act co-operatively in matters related to performance;

(4) the standard does not require a party to subordinate its legitimate interests to those of the counterparty, but is does require due regard to the legitimate interests that both parties have in the performance of the contract they have made;

(5) conduct which is dishonest, capricious, arbitrary or motivated by a purpose which is antithetical to the evident object of any provision of the franchise agreement or the Code that governs the conduct being scrutinised or conduct which is otherwise motivated by bad faith will not meet the standard;

(6) where the scrutinised conduct, viewed in the particular context, is objectively unreasonable then the unreasonableness may form part of the basis for a conclusion that there has been a lack of good faith, but objective unreasonableness is insufficient of itself to amount to a lack of good faith; and

(7) the quality of the scrutinised conduct is to be evaluated having regard to the circumstances of the particular parties, particularly their sophistication, commercial power and the relative significance for each party of the subject matter of the conduct."

Applying the principles to the case, Colvin J held that the respondent breached cl 6(1) of the Code by failing to act towards four of its franchisees in good faith concerning its charging practices (at [15] and [751]-[765]).

Industrial law

Costs under s570 of the *Fair Work Act 2009*

In ***Liu v Stephen Grubits & Associates*** (No 2) [2019] FCAFC 24 (12 February 2019) the Full Court dismissed an appeal in which it was contended that the Federal Circuit Court of Australia did not have power to make a costs order in relation to a matter under the *Fair Work Act 2009* (Cth) (FW Act). The joint judgment of Reeves, Kerr and Lee JJ depended on a construction of s79 of the *Federal Circuit Court of Australia Act 1999* (Cth) and provisions as to costs in Part 4.2 of the FW Act. The Full Court said at [18]: "The logic of the appellant's argument would be that costs could be awarded in FW Act matters by the Federal Court or any eligible State or Territory court but not by the Federal Circuit Court. To describe that result as anomalous would be an exercise in understatement (apart from constituting a result which means that the legislative intention as revealed by the EM must have miscarried)".

Practice and procedure – legal professional privilege

Whether lawyer lacked professional detachment from the firm and from the subject matter of the claim for privilege

In ***Martin v Norton Rose Fulbright Australia Ltd*** (No 2) [2019] FCA 96 (11 February 2019) Charlesworth J determined an interlocutory application challenging claims for legal professional privilege (LPP) on multiple bases. The context was litigation between a former staff partner of a law firm against the law firm. The applicant challenged the law firm's claims of LPP.

One issue of interest was the applicant's submission that the relationship between the law firm and its lawyers lacked a necessary feature of independence, such that the privilege claim in respect of any communications passing between them could not be maintained, whatever their purpose. Charlesworth J rejected this argument (at [150] to [214]). Charlesworth J stated at [188]: "The proposition that a lack of professional detachment on the part of an adviser will deny the entitlement to privilege must be rejected for a more fundamental reason: the privilege is that of the client, not that of the lawyer. Carried to its logical conclusion, the criterion of independence, as conceptualised by Brennan J in Waterford and Branson J in Rich, could not be fulfilled in circumstances where the personal interest of the lawyer obviously conflicted with the interests of the client. A lack of independence of that kind may cause the lawyer's advice to be partial, incomplete or wrong and subject the lawyer to disciplinary sanction. But it is difficult to comprehend why, for the purpose of the common law of privilege, the lack of independence should deprive the relationship as one of lawyer/client and even more difficult to comprehend why the client's privilege in the communication constituting the advice should be lost". ■

Information

Dan Star QC is a Senior Counsel at the Victorian Bar, telephone (03) 9225 8757 or email danstar@vicbar.com.au. **The full version of these judgments can be found at www.austlii.edu.au. Numbers in square brackets refer to a paragraph number in the judgment.**