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High Court judgments

September to November

ANDREW YUILE BARRISTER, VICTORIAN BAR

Limitation of actions

Recovery of debts – conflicting limitations periods

In *Brisbane City Council v Amos* [2019] HCA 27 (4 September 2019) the High Court considered which of two potentially overlapping limitation periods applied to the appellant's action. Pursuant to statutory powers, the appellant levied rates and charges against the respondent, the owner of land in Brisbane. Statute also provided that "overdue rates and charges are a charge on the land". The appellant brought an action to recover unpaid rates levied between 1999 and 2012. A number of defences were raised, but the High Court appeal related only to a limitation period pleaded. Section 26(1) of the Limitation of Actions Act 1974 (Qld) provided for a 12-year limitation period for actions "to recover a principal sum of money secured by a mortgage or other charge on property". That provision encompassed debts created by statute and secured by charge. Relevantly for this appeal, s10(1)(d) provided for a six-year limitation period for "an action to recover a sum recoverable by virtue of any enactment". The appellant argued that only the longer of the two limitation periods applied. The High Court said that one cannot understand the overlap between the sections without understanding their history. There was a long history of predecessor provisions and authorities dealing with interpretation of such provisions, English and Australian. Until the late 1800s, the overlap was dealt with by confining the longer limitation period to actions for real or proprietary claims, and the second and shorter period applied only to personal claims. However, in Barnes v Glenton [1899] 1 QB 885 it was held that a defendant could plead either limitation period where there was overlap. The shorter period for personal claims would not be extended by the s26 predecessor. The appellant in this case argued that Barnes v Glenton should not be followed. The High Court unanimously rejected that submission. The case had been followed consistently for more than 100 years and was the understanding on which the current provision had been drafted. The Court agreed with the majority from the Court of Appeal and dismissed the appeal. The defendant could plead either limitation period where there was overlap. Kiefel CJ and Edelman J jointly; Gageler J, Keane J and Nettle J each separately concurring. Appeal from Court of Appeal (Qld) dismissed.

Personal injury

Inferences of fact – error in material inferences at trial – review of Court of Appeal

Lee v Lee; Hsu v RACQ Insurance Limited; Lee v RACQ Insurance Limited [2019] HCA 27 (4 September 2019) concerned the correctness of inferences of fact drawn by the trial judge. The case concerned a car accident in which the appellant was rendered an incomplete tetraplegic. The critical issue at trial was, who was driving the car? The appellant and his family argued that the father was driving. The respondent argued that the appellant was driving and that he had been moved by his father into →

the back of the car following the crash. The driver of the other car involved in the crash observed the father, very shortly after the crash, in the back of the car removing one of the children. There was blood on the driver's side airbag belonging to the appellant. The trial judge found that the appellant was driving the car. On appeal, the Court of Appeal found critical errors in the reasoning of the trial judge. McMurdo JA said that, absent the DNA evidence, he would have found that the father was driving the car. However, the DNA evidence was such that the trial judge's finding could not be said to be wrong. The High Court held that judicial restraint in interfering with a trial judge's findings are limited to findings likely to have been influenced by impressions about witnesses and reliability. Aside from that, the Appeal Court is in as good a position as the trial judge to draw inferences from facts found. In this case, having rejected critical planks in the trial judge's reasoning, the Court of Appeal had to weigh the conflicting evidence and decide for itself what was the correct inference to draw. Further, the view that the DNA evidence was persuasive failed to consider an important assumption underlying expert evidence about the DNA, that the appellant was unrestrained by a seatbelt. However, the Court of Appeal found, consistent with the evidence at trial, that the driver was wearing a seatbelt. That finding required consideration of further expert evidence about seatbelts, which would have prevented the driver's face (and blood) coming into contact with the airbag. The High Court assessed the evidence and inferences for itself, and held that the better conclusion was that the father was the driver. Consequential orders were made allowing the appeal. Bell, Gageler, Nettle and Edelman JJ jointly; Kiefel CJ separately concurring. Appeal from the Court of Appeal (Qld) allowed.

Costs

Legal practitioners acting for themselves – Chorley exception

In *Bell Lawyers v Pentelow* [2019] HCA 28 (4 September 2019) the High Court considered whether a barrister acting for themselves in litigation should be able to recover costs for their time spent in the matter. As a general rule, a self-represented litigant cannot get recompense for the value of their time spent in litigation. However, there is a general exception to that rule for self-represented litigants who also happen to be solicitors. The exception was established in *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872. In the present case, the appellant retained the respondent, a barrister, to act in proceedings in the NSW Supreme Court. At the end of the proceedings there was a dispute over the respondent's costs. The respondent was unsuccessful in the local court but successful on appeal in the Supreme Court. Costs were awarded to the respondent. The respondent was represented by a solicitor in the local court and by senior counsel in the Supreme Court. She also attended court herself a number of times and was engaged in preparation of the case. The appellant disputed the respondent's costs. The issue for the High Court was whether the Chorley exception for solicitors should be extended to self-represented litigants who were also barristers. The Court unanimously held that the Chorley exception should not extend to barristers and a majority of the Court held that the Chorley exception should not be recognised as part of the common law of Australia at all (Nettle J held that there was no need or justification to decide the second point). The plurality said the exception was "an affront to the fundamental value of equality of all persons before the law", which could not be justified by policy. It was also inconsistent with the relevant statutory definition of "costs". Kiefel CJ, Bell, Keane and Gordon JJ jointly; Gageler J, Nettle J and Edelman J separately concurring. Appeal from the Court of Appeal (NSW) allowed.

Criminal law

Private prosecution – authority to prosecute federal crime – requirement for Attorney-General consent

Taylor v Attorney-General (Cth) [2019] HCA 30 (Orders 19 June 2019; reasons 11 September 2019) concerned whether a private citizen could institute a prosecution for crimes against humanity under the Criminal Code (Cth). The plaintiff lodged with the Melbourne Magistrates' Court a charge sheet and summons alleging that Aung

San Suu Kyi (president and foreign minister of Myanmar) had committed crimes against humanity contrary to s268.11 of the Criminal Code. Section 13(a) of the Crimes Act 1914 (Cth) provides that, unless the contrary intention appears in the relevant Act, any person may institute proceedings for commitment for trial in respect of any indictable offence against the law of the Commonwealth. Section 268.121(1) of the Criminal Code provides that proceedings for an offence against Div 268 of the Code must not be commenced without the consent of the Attorney-General, and s268.121(2) of the Code provides that an offence against Division 268 of the Code "may only be prosecuted in the name of the Attorney-General". The plaintiff sought the consent of the Attorney-General to commence his prosecution, which was refused. The plaintiff commenced judicial review proceedings in the original jurisdiction of the High Court. The parties stated questions for the Full Court's consideration concerning whether the Attorney-General's decision was susceptible to review on the grounds presented. However, a majority of the High Court held that it was unnecessary to answer those questions. The case was instead decided on an anterior question about whether Div 268 precluded the plaintiff's prosecution. A majority of the Court held that by providing that an offence against Div 268 could only be prosecuted in the name of the Attorney-General, there was a contrary intention for the purposes of s13(a) of the Crimes Act. That limit imposed an absolute restriction and exhaustive statement on the right to prosecute. It followed that the Attorney-General's decision not to consent was the only decision legally available in this case. The relief sought by the plaintiff had to be refused. Kiefel CJ, Bell, Gageler and Keane JJ jointly; Nettle and Gordon JJ jointly dissenting; Edelman J separately dissenting. Answers to Special Case given.

Constitutional law

Chapter III – parole periods – extension of non-parole by naming person

In *Minogue v Victoria* [2019] HCA 31 (11 September 2019) the High Court upheld the constitutional validity of provisions specifically preventing the parole of the plaintiff except in very limited circumstances. The plaintiff was convicted of the murder of Angela Taylor in 1988. The Court set a non-parole period of 28 years, which ended on 30 September 2016. On 3 October 2016, the plaintiff applied for parole. On 14 December 2016, the *Corrections Act 1986* (Vic) was amended to insert s74AAA, which prevented the Parole Board ("Board") making parole orders where the prisoner had been sentenced to a non-parole period for the murder of a person who the prisoner knew or as reckless as to whether the person was a police officer, except where the Board was satisfied that the prisoner was in imminent danger of dying or was seriously incapacitated, so that the prisoner no longer had the physical capacity to do harm to any person. The plaintiff commenced proceedings in the High Court's original jurisdiction challenging the constitutional validity of s74AAA. On 1 August 2018, the Corrections Act was further amended to insert s74AB. That section specifically applied to the plaintiff and prevented the Board from allowing his parole unless the Board was satisfied that: the plaintiff was in imminent danger of dying or was seriously incapacitated, such that he no longer had the physical capacity to do harm to any person; the plaintiff had demonstrated that he does not pose a risk to the community; and other circumstances justified the order. The plaintiff alleged that the amended provisions were contrary to Ch III of the Constitution because they impose additional or separate punishment by extending the non-parole period; they constitute cruel, inhuman or degrading treatment or punishment contrary to the Bill of Rights 1688; and they are inconsistent with the constitutional assumption of the rule of law. The High Court held that the new provisions were relevantly indistinguishable from the provision upheld in *Knight v Victoria* (2017) 261 CLR 306, where the Court refused to reopen its decision in Crump v New South Wales (2012) 247 CLR 1. The sections did not alter the sentence or impose additional punishment, nor did they involve the exercise of judicial power. They do no more than change the conditions that had to be met before the plaintiff could be released on →

parole. This conclusion meant that the second and third arguments of the plaintiff did not need to be considered. Section 74AB was valid, and as such, s74AAA did not need to be considered. Kiefel CJ, Bell, Keane, Nettle and Gordon JJ jointly; Gageler J and Edelman J separately concurring. Answers to Special Case given.

Restitution

Unjust enrichment – breach of contract – building contracts

In *Mann v Paterson Constructions* [2019] HCA 32 (9 October 2019) the High Court considered the application and interaction of principles of breach of contract and restitution in respect of a building contract. The appellants entered into a "major domestic building contract", as defined by the *Domestic Building Contracts Act 1995* (Vic), with the respondent builder. The contract provided for progress payments to be made on completion of stages of work. As work was being done, the appellants sought 42 variations without giving written notice as required by s38 of the Act. The builder carried out the variations, also without giving written notice as required by s38. Section 38 provides that a builder is not entitled to recover for work done in respect of a variation unless notice has been given (s38(6)(a)) or the Victorian Civil and Administrative Tribunal (VCAT) is satisfied that there are exceptional circumstances or that the builder would suffer significant or exceptional hardship; and that it would not be unfair to the building owner for the builder to recover the money (s38(6)(b)). After being issued with an invoice for the variations, the appellants repudiated the contract, which was accepted, thus terminating the contract. The respondent began proceedings in VCAT seeking damages or, alternatively, moneys for work done and materials provided. VCAT found that the appellants had wrongfully repudiated the contract and that the respondent was entitled to recover for the value of the benefit conferred on the owners, being the fair and reasonable value of the work. That amount was considerably greater than if the claim had been confined to the contract. VCAT also decided that s38 did not apply to a claim for restitution and it did not need to decide whether s38 applied in this case. Appeals to the Supreme Court and to the Court of Appeal were dismissed. The High Court unanimously held that s38 did operate to limit the amount that might be recovered by way of restitution. It excluded the availability of restitutionary relief for variations other than in accordance with s38. The Court also held that, for amounts not in respect of the variations, the builder could claim for amounts due for stages completed by the time of termination or for breach of contract for any uncompleted stage of the contract. A majority of the Court also held that the builder was entitled to recovery by way of restitution, in the alternative to breach of contract. However, the claimant should not be able to recover more by restitution than would have been available under the contract. Any amount recoverable in restitution should therefore be limited in accordance with the rates or overall price in the contract. Kiefel CJ, Bell and Keane JJ jointly; Nettle, Gordon and Edelman JJ jointly; Gageler J separately concurring with Nettle, Gordon and Edelman JJ. Appeal from Court of Appeal (Vic) allowed.

Corporations law

Financial assistance of company to acquire shares in the company

Connective Services Pty Ltd v Slea Pty Ltd [2019] HCA 33 (9 October 2019) concerned the scope of s260A of the *Corporations Act 2001* (Cth). The appellant companies (Connective Companies) were incorporated in 2001. The shareholders have relevantly been the first respondent (Slea Pty Ltd, (Slea)), the third respondent (Millsave Holdings Pty Ltd (Millsave)) and the fourth respondent (Mr Haron). The constitution of each Connective Company contained a pre-emption clause, requiring that before a shareholder could transfer shares of a particular class, those shares had to be offered to existing shareholders. In 2009, the sole director and shareholder of Slea, Mr Tsialtas, entered into an agreement with the second respondent (Minerva Financial Group Pty Ltd (Minerva)) for the sale of Mr Tsialtas's shares in Slea. A second agreement was made in 2010 between Mr Tsialtas, Slea and Minerva. In 2016, the Connective Companies began

proceedings against Slea and Minerva (also joining Millsave and Mr Haron), alleging that Slea intended to transfer its shares in the Connective Companies to Minerva without complying with the pre-emption provision. Slea and Minerva applied to have the proceedings dismissed or stayed. One form of relief sought was an injunction under s1324 of the Act, restraining the Connective Companies from prosecuting the pre-emption proceedings on the basis that the proceedings constituted a contravention of s260A of the Act. That provision prevents a company from providing financial assistance to a person to acquire shares in the company except if the assistance does not materially prejudice the interests of the company or its shareholders, or the company's ability to pay its shareholders. The High Court held that "Any action by the company can be financial assistance if it eases the financial burden that would be involved in the process of acquisition or if it improves the person's 'net balance of financial advantage'". It extends beyond direct contributions to share price. In this case, bringing legal proceedings against Slea was a necessary step for the vindication of the pre-emption rights of Millsave and Mr Haron. The proceedings could have been brought by Millsave or Mr Haron. If that had been done, the provision of any financial assistance by the Connective Companies would have contravened s260A. Instead, the Connective Companies, in which Millsave and Mr Haron held 66.67 per cent of the shares, themselves commenced the proceedings, at the companies' expense. That commencement was financial assistance to Millsave and Mr Haron. And the Connective Companies had not shown that there was no material prejudice to the Connective Companies or their shareholders. Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ jointly. Appeal from the Court of Appeal (Vic) dismissed.

Migration

Fast Track – procedural fairness – certificates under s473GB

In *BVD17 v Minister for Immigration and Border Protection* [2019] HCA 34 (9 October 2019) the High Court held that procedural fairness did not require the Immigration Assessment Authority (IAA) to inform the applicant of a notification under s473GB(2)(b) of the *Migration Act 1958* (Cth). The appellant made an application for a protection visa that was refused by a delegate of the Minister. The application was referred to the IAA for consideration under the Fast Track regime in Part 7AA of the Act. Section 473GB applies to documents given to the Minister or the Department in confidence. Where it applies, s473GB(2)(a) obliges the Secretary to notify the IAA in writing that s473GB applies in relation to a document or information. The IAA may then have regard to any matter in the document or information and may, in certain circumstances, disclose the document or material to the applicant. In relation to reviews by the IAA, s473DA(1) provides that Div 3 of Part 7AA, with ss473GA and 473GB, "is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the [IAA]". In this case, a s473GB notification was issued to the IAA. The IAA did not disclose to the applicant any of the documents or information in the file and did not disclose the fact of the notification. The applicant argued, relying on the decision in *Minister for Immigration and Border Protection v SZMTA* (2019) 363 ALR 599 (SZMTA), that the failure to tell the applicant about the fact of the notification from the Secretary was a breach of procedural fairness. SZMTA concerned review under Part 7 of the Act by the Administrative Appeals Tribunal. The High Court held that s473DA provides for a different procedural fairness obligation to that imposed under Part 7 of the Act. Section 473DA precludes an obligation equivalent to that in SZMTA. Further, in this case, there was insufficient evidence to infer that the IAA failed to consider exercising the discretion conferred by s473GB(3)(b) of the Act. Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ jointly; Edelman J dissenting. Appeal from the Full Federal Court dismissed. →

Criminal law

Statutory construction – meaning of "mutilates" and "clitoris" in female genital mutilation offence

The Queen v A2; The Queen v Magennis; The Queen v Vaziri [2019] HCA 35 (16 October 2019) concerned the proper interpretation of s45(1)(a) of the *Crimes Act 1900* (NSW). That section makes it an offence to excise, infibulate or "otherwise mutilate the whole or any part of the labia majora or labia minora or clitoris" of another person. A2 and Magennis were charged with mutilating the clitoris of C1 and C2 on separate occasions. Vaziri was charged with assisting A2 and Magennis. The charges arose from a ceremony called "khatna" performed on C1 and C2. It involves causing injury to a girl's clitoris by cutting or nicking it. The defence case was that the procedure was merely ritualistic and did not involve any nick or cut to the clitoris of C1 or C2. Evidence was led by the Crown to rebut this. The defence further argued that, even if there was a cut or a nick, there had not been "mutilation" within the meaning of s45(1)(a). The trial judge directed the jury that "mutilate" in the context of this provision meant "injure to any extent". A nick or a cut was capable of being mutilation. There was also a question whether "clitoris" included the clitoral hood or prepuce. The jury found each accused guilty. The Court of Appeal held that the trial judge misdirected the jury and that "mutilates" should be given its ordinary meaning, requiring more than superficial injury or some irreparable damage. The High Court, by majority, upheld an appeal from that decision. The majority held that, in context, s45(1)(a) should be read as extending to criminalise female genital mutilation in its various forms. That encompassed the nicking or cutting of the clitoris of a child, even if there was no permanent damage. Further, "clitoris" in this context included the clitoral hood and the prepuce. The trial judge had therefore not misdirected the jury. The majority held that the matters should be remitted to the Court of Appeal for further consideration of other grounds of appeal in light of the proper construction of s45(1)(a). Kiefel CJ and Keane J jointly; Nettle and Gordon JJ jointly concurring; Edelman J separately concurring; Bell and Gageler JJ jointly dissenting. Appeal from the Court of Appeal (NSW) allowed.

Tax law

Income tax – capital expenditure – gaming machine entitlements

Commissioner of Taxation v Sharpcan Pty Ltd [2019] HCA 36 (16 October 2019) concerned whether gaming machine entitlements (GMEs) acquired by the respondent were deductible under s8-1 of the Income Tax Assessment Act 1997 (Cth). The respondent was the sole beneficiary of the Daylesford Royal Hotel Trust. Spazor Pty Ltd, the trustee of the Trust, purchased the Royal Hotel in Daylesford. The trustee did not purchase 18 gaming machines in the hotel, but received a percentage of income derived from them. In 2008, under new legislation, the trustee bid for and was allocated 18 GMEs allowing it to operate the gaming machines itself. The GMEs were paid for by instalment, with forfeiture in default. The trustee claimed the purchase price as a deduction under s8-1 of the Act, or one-fifth of the price under s40-880 of the Act. The claims were disallowed by the Commissioner. That decision was set aside by the Administrative Appeals Tribunal (AAT), which decided that the purchases were not of a capital nature and deductible. The Full Federal Court by majority dismissed an appeal from the AAT's decision. The High Court unanimously upheld an appeal. The Court held it was not to the point that the price was to be recouped out of daily trading; that the purchase price may have reflected the economic value of the income stream expected to be derived; that the business was integrated and would have been prejudiced if the GMEs had not been purchased; or that a change in the law allowed the trustee to purchase the GMEs. The purpose in paying the purchase price was to acquire, hold and deploy the GMEs as enduring assets of the business for the purpose of generating income. The GMEs were also necessary for the structure of the business. Although by instalment, the purchase was in the nature of a once-and-for-all outgoing for the purchase of an enduring asset, not a regular and recurrent payment for the

use of an asset. Further, the High Court held that evidence did not establish that the purpose of purchasing the GMEs was to preserve but not enhance the goodwill of the business. The value of the GMEs to the trustee was also not solely attributable to the effect that the GMEs had on goodwill. Section 40-880 of the Act did not apply. Kiefel CJ, Bell, Gageler, Nettle and Gordon JJ jointly. Appeal from the Full Federal Court allowed.

Corporations law

Financial assistance of company to acquire shares in the company

Connective Services Pty Ltd v Slea Pty Ltd [2019] HCA 33 (9 October 2019) concerned the scope of s260A of the *Corporations Act 2001* (Cth). The appellant companies (Connective Companies) were incorporated in 2001. The shareholders have relevantly been the first respondent (Slea Pty Ltd, (Slea)), the third respondent (Millsave Holdings Pty Ltd (Millsave)) and the fourth respondent (Mr Haron). The constitution of each Connective Company contained a pre-emption clause, requiring that before a shareholder could transfer shares of a particular class, those shares had to be offered to existing shareholders. In 2009, the sole director and shareholder of Slea, Mr Tsialtas, entered into an agreement with the second respondent (Minerva Financial Group Pty Ltd (Minerva)) for the sale of Mr Tsialtas's shares in Slea. A second agreement was made in 2010 between Mr Tsialtas, Slea and Minerva. In 2016, the Connective Companies began proceedings against Slea and Minerva (also joining Millsave and Mr Haron), alleging that Slea intended to transfer its shares in the Connective Companies to Minerva without complying with the pre-emption provision. Slea and Minerva applied to have the proceedings dismissed or stayed. One form of relief sought was an injunction under s1324 of the Act, restraining the Connective Companies from prosecuting the pre-emption proceedings on the basis that the proceedings constituted a contravention of s260A of the Act. That provision prevents a company from providing financial assistance to a person to acquire shares in the company except if the assistance does not materially prejudice the interests of the company or its shareholders, or the company's ability to pay its shareholders. The High Court held that "Any action by the company can be financial assistance if it eases the financial burden that would be involved in the process of acquisition or if it improves the person's 'net balance of financial advantage'". It extends beyond direct contributions to share price. In this case, bringing legal proceedings against Slea was a necessary step for the vindication of the pre-emption rights of Millsave and Mr Haron. The proceedings could have been brought by Millsave or Mr Haron. If that had been done, the provision of any financial assistance by the Connective Companies would have contravened s260A. Instead, the Connective Companies, in which Millsave and Mr Haron held 66.67 per cent of the shares, themselves commenced the proceedings, at the companies' expense. That commencement was financial assistance to Millsave and Mr Haron. And the Connective Companies had not shown that there was no material prejudice to the Connective Companies or their shareholders. Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ jointly. Appeal from the Court of Appeal (Vic) dismissed.

Criminal law

Murder – case based on circumstantial evidence – unreasonable verdict

In *Fennell v The Queen* [2019] HCA 37 (Orders 11 September 2019; reasons 6 November 2019) the High Court quashed the appellant's conviction on the basis that it was not open to the jury to be satisfied of his guilt. Mr Fennell was convicted of the murder of Ms Liselotte Watson in her home in a small community on Macleay Island. The Crown case was entirely circumstantial, relying on a window of opportunity and Mr Fennell's access to Ms Watsons' house; motive (he knew Ms Watson had cash in her house, he had been stealing from her to service gambling debts, and he didn't want her to find this out); and other matters said to be inculpatory. The most significant "other matter" was evidence from a Mr and Mrs Matheson purporting to identify a hammer that was the likely murder weapon as one they had given the appellant many years before. The jury convicted and the Court of Appeal dismissed an appeal, finding that the motive and opportunity evidence were sufficient and the evidence of →

the Mathesons could be taken as convincing proof of his link to the murder. The High Court held that the crown case on motive and opportunity was extremely weak. The relevant window for the alleged murder was very small and required assumptions contradicted by other evidence. On motive, the appellant was in no different position to other residents of Macleay Island. Further, Mr Fennell's gambling habits had not changed, but he was not in debt and ahead on mortgage repayments. A search of the appellant's home found nothing to link him to the murder. None of his DNA or fingerprints were at the crime scene and he was excluded as a DNA contributor to a bag found with the hammer. Finally, the evidence of the Mathesons was glaringly improbable and should have been given such little weight that it was barely admissible. In light of all of these matters, it was not open on the evidence for the jury to be satisfied of Mr Fennell's guilt. Kiefel CJ, Keane, Nettle, Gordon and Edelman JJ jointly. Appeal from Court of Appeal (Qld) allowed.

Constitutional law

Ch III – principles from Kable and Kirk – preventative control orders

In *Vella v Commissioner of Police (NSW)* [2019] HCA 38 (6 November 2019) a majority of the High Court upheld the validity of s5(1) of the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) (SCPO Act). Sections 5 and 6 of the SCPO Act empower the District Court or the Supreme Court of NSW to make "civil preventative orders" that can restrain the liberty of an individual, including without proof of the commission of an offence by that individual. The plaintiffs were the object of orders sought in the Supreme Court, seeking to restrain and prohibit them from associating with persons involved in Outlaw Motorcycle Gangs, attending the premises of such gangs, travelling in a vehicle in certain periods except in case of emergency, and possessing more than one mobile phone. Section 5 was challenged on the basis of the principles developed from *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 – incompatibility with the institutional integrity of the relevant Courts. The majority identified six steps to be satisfied before power to make a preventative order was enlivened. The majority noted previous decisions of the Court holding that other preventative order regimes dealing with possible terrorist acts, sexual offenders and criminal acts do not infringe the Kable principles. The majority held that the SCPO Act gives courts substantial judicial discretion in respect of making orders and their content. The Courts were not enlisted by the Executive. The challenge based on judicial power was contrary to history and prior authority. And there was nothing antithetical to the judicial process in open-textured legislation establishing broad principles to be developed and applied by courts. To the contrary, if such powers are to exist, it is desirable that they be exercised by courts with broad discretions. Bell, Keane, Nettle and Edelman JJ jointly; Kiefel CJ separately concurring; Gageler J and Gordon J each separately dissenting. Answers to Questions in Special Case given.

Proceeds of crime

Forfeiture of tainted property – proceeds or instruments of offending – third party acquisition

Lordianto v Commissioner of the Australian Federal Police; Kalimuthu v Commissioner of the Australian Federal Police [2019] HCA 39 (13 November 2019) both concerned whether money held in bank accounts had ceased to be the proceeds of crime or the instrument of an offence under s330(4)(a) of the *Proceeds of Crime Act 2002* (Cth) (POCA). The appellants were involved in a money laundering scheme known as "cuckoo smurfing", in which a person offshore asks a remitter to transfer funds to Australia. The remitter withholds the money, while in Australia associates deposit money into the transferee's account, in amounts beneath a reporting threshold of $10 000. In both cases, the Commissioner obtained orders under s19 of the POCA restraining the funds in bank accounts of the appellants, on the basis that they were the proceeds of crime or instruments of offending. The relevant offences were structuring offences contrary to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth). The appellants later sought to have excluded from the restraining order choses in

action in respect of the bank accounts (being the entitlement to require the banks to pay out the money to the appellants' credit in the accounts). The appellants in both cases conceded that the "property" had been the proceeds of crime or an instrument of offending, but argued that it had ceased to have that character. They argued that the property had been acquired by a third party for sufficient consideration, without the third party knowing that the property was the proceeds or instrument of an offence, pursuant to s330(4)(a) of the POCA. The High Court considered the proper interpretation of s330(4)(a), holding that the section must be read as a whole and not as a series of isolated elements. Section 330(4)(a) provides a limited exclusion, in many cases similar to the inquiry about bona fide purchaser for value without notice. After considering the matters to be satisfied in s330(4)(b), the Court held – unanimously in respect of the appellant in the Lordianto appeal and the first appellant in the Kalimuthu appeal; and by majority in respect of the second appellant in the Kalimuthu appeal – that the appellants had failed to discharge the onus to meet the section's requirements. Kiefel CJ, Bell, Keane and Gordon JJ jointly; Edelman J separately concurring in respect of Lordianto and the first appellant in Kalimuthu, and dissenting in respect of the second appellant in Kalimuthu. Appeals from the Court of Appeal (NSW) and Court of Appeal (WA) dismissed.

Criminal law

Crown appeal against sentence – procedural fairness – public interest immunity

HT v The Queen [2019] HCA 40 (13 November 2019) concerned procedural fairness to an accused in circumstances where a confidential summary of assistance was provided to the Court but not to the accused on grounds of public interest immunity (PII). The accused pleaded guilty to 11 counts of fraud each with maximum penalties of five or 10 years' imprisonment. The offending was found to be very serious with a high level of moral culpability. By s23(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), one matter the sentencing judge had to take into account was assistance given to law enforcement. The accused was a registered informant and had provided significant assistance. Before the sentencing judge, the Crown gave the accused's counsel a choice between producing a much shorter (inferentially less beneficial) document outlining the accused's assistance that the accused could see, and a longer (inferentially more beneficial) statement that would be provided only to the Court. Counsel chose the latter. A confidential exhibit was given to the judge setting out the assistance. The judge gave the accused a discount of 35 per cent of which 15 per cent was identified as for her guilty plea. She was sentenced to three years and six months' imprisonment, with a non-parole period of 18 months. The Crown appealed the sentence. On appeal, counsel for the accused sought access to the confidential exhibit. The Court of Appeal took the document into account but upheld a claim of PII over the exhibit made by the Police (supported by the Crown) to prevent access for the accused. The Court increased the discount for assistance to 40 per cent, but re-sentenced the accused to six years and six months' imprisonment, with a non-parole period of three years and six months. The High Court held unanimously that the accused had been denied procedural fairness in the Court of Appeal. By being denied access to the exhibit, she was denied a reasonable opportunity to be heard. PII did not justify the denial of procedural fairness. That doctrine, where it applies, excludes material from being admissible. Where necessary, orders can be tailored to meet the demands of sensitive evidence. However, PII does not allow for material to be admitted into evidence but kept confidential from an accused. No other sources of power sought to be relied on justified that position. Further, the Crown had an obligation to place all relevant material before the Court. Where sensitivities arose, tailored orders might be made. In the circumstances, the Court set aside the orders of the Court of Appeal and reinstated the orders of the trial judge. Kiefel CJ, Bell and Keane JJ jointly; Nettle and Edelman JJ jointly concurring; Gordon J separately concurring. Appeal from the Court of Criminal Appeal (NSW) allowed.

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The full version of these judgments can be found at: www.austlii.edu.au.

High Court judgments

November to December

DAVID KELSEY-SUGG BARRISTER, VICTORIAN BAR

Criminal practice

Crown appeal against sentence – procedural fairness

HT v The Queen [2019] HCA 40 (13 November 2019) concerned whether the appellant had been denied procedural fairness in the Court of Criminal Appeal and, if so, whether that denial was justified. The appellant had been convicted and sentenced in the District Court of New South Wales. She was a registered police informer who had provided assistance to law enforcement authorities. The sentencing judge was required, by statute, to take that assistance into account as a mitigating factor. Confidential evidence of the appellant's assistance was given to the sentencing judge and was seen by the Crown Prosecutor. It was not, however, given to the appellant's counsel.

The Commissioner of Police had opposed making the confidential information available to the appellant or her legal representatives even with the imposition of conditions. The basis given for this was public interest immunity. The Crown supported that stance. The Court of Criminal Appeal upheld the Commissioner's objection on the ground that the confidential information was subject to public interest immunity.

The High Court said the appellant, having been denied access to the confidential evidence, and therefore an opportunity to test and respond to it, was denied procedural fairness. The doctrine of public interest immunity did not provide a basis for keeping the confidential evidence from the appellant. The Court of Criminal Appeal was wrong to exercise its residual discretion.

Kiefel CJ, Bell and Keane JJ jointly. Nettle and Edelman JJ jointly concurring. Gordon J separately concurring. Appeal from the Supreme Court of New South Wales allowed.

Immigration

Administrative law – judicial review – jurisdictional error

In *EBT16 v Minister for Home Affairs* [2019] HCA 44 (13 November 2019) the plaintiff applied for a constitutional or other writ in the original jurisdiction of the High Court under s75(v) of the Constitution. The plaintiff sought a writ of certiorari quashing two orders of the Federal Circuit Court. By the first order, the Federal Circuit Court refused an application by the plaintiff for an extension of time under s477(1) of the *Migration Act 1958* (Cth) for the filing of an application for judicial review of a decision of the Administrative Appeals Tribunal. The second order dismissed the application for judicial review in respect of which the extension of time was sought. The plaintiff also sought a writ of mandamus requiring the Federal Circuit Court to determine his application for an extension of time according to law.

The High Court did not consider that the plaintiff's application raised an arguable basis for the relief

sought by the plaintiff.

Gageler J. Application dismissed under r25.09.1 of the High Court Rules 2004 (Cth).

Income tax

Appeal against objection decision

In *Bosanac v Commissioner of Taxation* [2019] HCA 41 (22 November 2019) the plaintiff sought a writ of certiorari to quash a judgment and orders of the Full Court of the Federal Court, a writ of certiorari to quash the primary judge's judgment, and other orders including a writ of mandamus to compel the Commissioner of Taxation to excise $600 000 from the plaintiff's assessable income for the year ended 30 June 2009.

In March 2014, the Commissioner commenced an audit into the plaintiff's tax affairs. Before the completion of the audit, the plaintiff lodged tax returns for the years ended 30 June 2006 to 30 June 2013 for the first time. On completion of the audit, the Commissioner issued notices of amended assessments that substantially increased the plaintiff's taxable income. The plaintiff objected. The Commissioner then issued notices of further amended assessments. The plaintiff commenced an appeal in the Federal Court against those assessments pursuant to s14ZZ of the *Taxation Administration Act 1953* (Cth).

The onus was on the plaintiff to prove on the balance of probabilities the extent to which the impugned assessments were excessive. The plaintiff failed to do so before the primary judge. He then appealed to the Full Court, which dismissed the appeal. The High Court said there was no error in the reasoning of the Full Court and no basis for compelling the Commissioner to reduce the further amended assessment in respect of the 2009 year of income by the amount of $600 000.

Nettle J. Application dismissed.

Representative proceedings

Power to make common fund orders

BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall [2019] HCA 45 (4 December 2019) concerned whether, in representative proceedings, s33ZF of the *Federal Court of Australia Act 1976* (Cth) and s183 of the *Civil Procedure Act 2005* (NSW) empower the Federal Court and the Supreme Court of New South Wales to make a "common fund order". Such an order is usually made early in representative proceedings and provides for the quantum of a litigation funder's remuneration to be fixed as a proportion of any money ultimately recovered in the proceedings, for all group members to bear a proportionate share of that liability, and for that liability to be discharged as a first priority from any money so recovered.

The issue was resolved in the affirmative against the appellants – in the Westpac appeal by the Full Court of the Federal Court of Australia, and in the BMW appeal by the Court of Appeal of the Supreme Court of New South Wales.

By majority, the High Court said that properly construed, neither s33ZF of the FCA nor s183 of the CPA empowers a court to make a common fund order. Those sections provide that in a representative proceeding, the court may make any order the court thinks appropriate or necessary to ensure that justice is done in the proceeding. While the power conferred is wide, it does not extend to the making of a common fund order. The sections empower the making of orders as to how an action should proceed in order to do justice. They are not concerned with the different question of whether an action can proceed at all.

It was not appropriate or necessary to ensure that justice is done in a representative proceeding for a court to promote the prosecution of the proceeding in order to enable it to be heard and determined by that court. The making of an order at the outset of a representative proceeding, in order to assure a potential funder of the litigation of a sufficient level of return on its investment to secure its support for the proceeding, was beyond the purpose of the legislation. →

Kiefel CJ, Bell and Keane JJ jointly. Nettle and Gordon JJ each separately concurring. Gageler and Edelman JJ each separately dissenting. Appeal from the Court of Appeal of the Supreme Court of New South Wales allowed in the BMW appeal. Appeal from the Full Court of the Federal Court of Australia allowed in the Westpac appeal.

Police powers

Arrest without warrant

New South Wales v Robinson [2019] HCA 46 (4 December 2019) concerned whether a police officer has the power to arrest a person, without warrant, under s99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA) when, at the time of the arrest, the officer had not formed the intention to charge the arrested person.

Mr Robinson had brought proceedings in the District Court of New South Wales against the State of New South Wales claiming damages for wrongful arrest and false imprisonment constituted by his arrest. The State of New South Wales defended the claim on the basis that the arrest was lawfully effected pursuant to s99 of LEPRA.

On the evidence, the arresting officer had no intention, at the time of the arrest, of bringing Mr Robinson before an authorised officer to be dealt with according to law unless it emerged subsequent to the arrest that there was sufficient reason to charge him.

By majority, the High Court said an arrest under s99 can only be for the purpose, as soon as is reasonably practicable, of taking the arrested person before a magistrate (or other authorised officer) to be dealt with according to law to answer a charge for that offence. An arrest merely for the purpose of asking questions or making investigations in order to see whether it would be proper or prudent to charge the arrested person with the crime is unlawful.

The arresting officer did not have the power to arrest Mr Robinson, without warrant, under s99 of LEPRA when, at the time of the arrest, the officer had not formed the intention to charge Mr Robinson. The arrest was unlawful.

Bell, Gageler, Gordon and Edelman JJ jointly. Kiefel CJ, Keane and Nettle JJ jointly dissenting. Appeal from the Supreme Court of New South Wales dismissed.