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Friday, 15 March 2024

Weekly Family Law

A Weekly Bulletin listing Decisions of Superior Courts of Australia covering family law

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Executive Summary (One Minute Read)

Lingard v Commonwealth Bank Officers Superannuation Corporation Pty Limited (FCA) - Court determining whether a former de facto was a spouse at the relevant time for the purpose of superannuation law had not erred by not taking provisions of the *Family Law Act 1975* (Cth) into account

Lubbert & Lubbert (FedCFamC1A) - primary judge had not erred in adopting a global approach to the distribution of assets

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Summaries With Link (Five Minute Read)

Lingard v Commonwealth Bank Officers Superannuation Corporation Pty Limited [2024] FCA 174
Federal Court of Australia
Sarah C Derrington J
De facto relationships - Lingard and Ogden commenced a romantic relationship - Ogden signed a non-lapsing Death Benefit Nomination in respect of his superannuation fund's death benefit, and nominated his two children to each receive a 40% share of the death benefit, and Lingard to receive a 20% share - the relationship between Lingard and Ogden then ended - Odgen then died - under the fund's trust deed, whether Lingard's death benefit entitlement could be paid to her depended on whether, at the time of Ogden's death, she was Ogden's spouse, wholly or substantially dependent on him, the holder of a right to look to him for financial support, or a dependant within the meaning of the *Superannuation Industry (Supervision) Act 1993* (Cth) - the trustee initially decided to pay the benefit, but reversed this decision after objection from the mother of Ogden's children, Ogden's daughter, and the executor of Ogden's estate - the Australian Financial Complaints Authority upheld this decision - Lingard appealed to the Federal Court on questions of law - held: the Court could not deal with errors of fact, whether or not they flowed from alleged errors of law - however, the Court may, in an appropriate case, frame questions of law in order to found its jurisdiction where, for example, an applicant is unrepresented and it is possible to discern a question which, if properly framed, could found the jurisdiction of the court - AFCA did not err in law by failing to take relevant considerations into account, and in particular by failure to consider s44(5) of the *Family Law Act 1975* (Cth) - human relationships are unique, and it is not possible to formulate precise criteria by which to assess the qualitative nature of a relationship between two people - the courts and legislature have attempted to provide some guidelines, and, in particular, the factors identified by Powell J in *Roy v Sturgeon* (1986) 11 NSWLR 454 have informed those now found in the *Superannuation Industry (Supervision) Act* and *Regulations* and s4AA(2) of the *Family Law Act* - on each occasion when a court comes to consider whether or not a couple is in a de facto relationship, or is a dependant, its answer will be informed by the reason for which the question is being asked, and by the statutory framework relevant to the circumstances in which the question is being asked - appeal dismissed.
Lingard
[From Benchmark Friday, 15 March 2024]

Lubbert & Lubbert [2024] FedCFamC1A 18
Federal Circuit and Family Court of Australia (Division 1) Appellate Jurisdiction
Campton J
Property - the primary judge applied a global approach to the assessment of contributions to a single pool of non-superannuation and superannuation property, making a finding as to equality - the husband appealed - held: a complaint that a result of a discretionary decision at first instance was "unreasonable or plainly unjust" (as referred to in *House v The King*) or "plainly

wrong" (as referred to in *Norbis v Norbis* [1986] HCA 17; 161 CLR 513) is a viable ground of appeal which lies from a discretionary decision, though difficult to establish - the husband's complaints in this regard were not more than bare complaints that the husband received less of the equity in a particular property than he viewed as just and equitable - these grounds failed - procedural fairness requires each party to be given an adequate opportunity to be heard and to present their case - the husband engaged directly with the primary judge on the issue of whether he was to transfer his interest in a property to the wife with the wife to refinance the joint mortgage - how this effected any injustice of any kind, whether by procedural unfairness or otherwise, was wholly unclear - the Court has a discretion as to which approach to take pursuant to s79 of the *Family Law Act 1975* (Cth), and particularly whether to adopt a global approach or a two-pool approach - the evidence did not support the husband's submission that he made substantial contributions to his superannuation following separation - appeal dismissed.

Lubbert & Lubbert

[From Benchmark Friday, 15 March 2024]

Executive Summary and (One Minute Read)

Smith v Fonterra Co-Operative Group Ltd et al (NZSC) - Supreme Court of New Zealand rejects attempt to strike out claim in tort relating to damage caused by climate change. Court affirms that principles of Maori customary law (tikanga Maori) inform the common law of New Zealand

Summaries With Link (Five Minute Read)

Smith v Fonterra Co-Operative Group Ltd et al [2024] NZSC 5
Supreme Court of New Zealand
Winkelmann CJ, Glazebrook, Ellen France, Williams, & Kos JJ
Mr Michael Smith as an elder and as a climate changes spokesperson for the Iwi Chairs Forum, a national forum of tribal leaders, brought suit against Fonterra and other large New Zealand corporations that were engaged in mining or manufacturing. Seeking an injunction, he raised three tort causes of action: public nuisance, negligence, and a new tort - damage to the climate system. All three counts were stricken by the Court of Appeal. In reversing this decision, the Supreme Court examined both climate change as well as legal remedies available in New Zealand. The Court was very clear that it was appropriate for the traditional or customary Maori law (tikanga Maori) to be considered in formulating the common law of New Zealand. The Court accepted as indisputable that climate change threatens human well-being and planetary health and that the evidence was unequivocal that humans had warmed the atmosphere principally through the emission of Green House Gasses (GHG). The Court also reviewed treaty obligations and New Zealand's comprehensive legislation - the *Climate Change Response Act 2002* (NZ) (CCRA). Mr Smith alleged that the defendants were responsible for more than one-third of New Zealand's GHG emissions. Mr Smith relied on the principles of tikanga Maori that establish various obligations and relationships with respect to land, the environment and that a breach creates a hara (issue) requiring utu (compensatory action) to restore ea (a state of harmony). The relief sought for all of the causes of action was an injunction requiring the defendants to reduce net emissions annually under supervision of the Court to achieve zero-net emissions by 2050. After rejecting the defendants' claim that the tort claims were excluded by the CCRA, the Court engaged in a comprehensive review of the law of nuisance as it developed in New Zealand, the UK, Canada, and the USA, and found that the claim had evolved with the passage of time. However, to maintain a claim, the plaintiff must establish that the harm was a reasonably foreseeable consequence of defendant's conduct, and that the defendant's act must unreasonably interfere with public rights. The Court held that the standard required to strike out a claim had not been met and that Mr Smith was entitled to bring his case to trial

where he would have an opportunity to present full evidence. As to claims arising from climate change, the Court found that these were in principle in accord with traditional nuisance cases where one party contaminated a water course to the detriment of the public and private parties. The Court said, 'climate change engages comparable complexities [of proof], albeit at a quantum leap scale enlargement'. As to liability of a single party where multiple parties contribute to the harm, the Court stated that it was no defence to creating a nuisance that others were engaged in the same conduct - it is unnecessary that the defendant be the sole polluter, only that the defendant was a significant cause of the harm - all questions of fact. Relying on Canadian and American decisions, the Supreme Court adopted the view that everyone who contributes to a nuisance is liable providing that in the aggregate a nuisance is proven. The Supreme Court reinstated all three claims for trial where questions include: (1) whether New Zealand's law of public nuisance should sanction GHG emissions - And (2) whether the actions of the corporate respondents amounted to a substantial and unreasonable interference with public rights? The Court added that the likely legal battleground would involve: causation, substantiality, unreasonableness, and remedy. With respect to the nuisance cause of action, the Court concluded that the principles governing public nuisance ought not to stand still in the face of massive environmental challenges attributable to human economic activity. The Common law, where it is not clearly excluded, responds to challenge and change in a considered way, through trials involving the testing of evidence. As the Court allowed the claim for nuisance to survive for trial, the Supreme Court declined to rule on the remaining claims for negligence and the proposed new climate change tort. The Court found that ruling on these claims was unnecessary because the same evidence supported all claims and that they all should go to trial where they could be fully developed. As to the effect of tikanga on the common law of tort, the Supreme Court rejected the Court of Appeal decision that the CCRA statutory scheme satisfied tikanga Maori. Instead, the Supreme Court held that the trial court must engage with tikanga because part of Mr Smith's loss is based on tikanga. The Court added that tikanga has been applied to common law tort actions since 1840. For example, the Court cited to a 2003 Court of Appeal decision affirming that Maori land rights derived from tikanga were cognisable at common law. The Court reiterated the continued vitality of tikanga in New Zealand: To summarise the essential conclusions reached, tikanga was the first law of New Zealand, and it will continue to influence New Zealand's distinctive common law as appropriate according to the case and to the extent appropriate in the case. Inasmuch as the plaintiff Mr Smith is acting not only in individual capacity but also on behalf of traditional entities, the Supreme Court held that the trial court must consider tikanga concepts of loss that are neither physical nor economic.
Smith

Poem for Friday

Near Avalon

By: William Morris (1834-1896)

A ship with shields before the sun,
Six maidens round the mast,
A red-gold crown on every one,
A green gown on the last.

The fluttering green banners there
Are wrought with ladies' heads most fair,
And a portraiture of Guenevere
The middle of each sail doth bear.

A ship with sails before the wind,
And round the helm six knights,
Their heaumes are on, whereby, half blind,
They pass by many sights.

The tatter'd scarlet banners there
Right soon will leave the spear-heads bare.
Those six knights sorrowfully bear
In all their heaumes some yellow hair.

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