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Benchmark

Friday, 15 March 2024

Weekly Wills, Estates and Superannuation Law

A Weekly Bulletin listing Decisions of Superior Courts of Australia covering Wills Estates and Superannuation Law

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Executive Summary (One Minute Read)

Wilson v SAS Trustee Corporation (NSWCA) - trustee of the Police Superannuation Scheme did not have power to issue a new certificate, adding PTSD to the infirmities suffered by the appellant, 17 years after discharge and issue of the original certificate

Cronan as executrix of the will Regan v Coates (WASC) - solicitor restrained from acting in probate case as she would be a material witness regarding the circumstances of the preparation of a purported informal will

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Summaries With Link (Five Minute Read)

Wilson v SAS Trustee Corporation [2024] NSWCA 53
Court of Appeal of New South Wales
Leeming & Kirk JJA, & Griffiths AJ
Workers compensation - the appellant was a former NSW police officer who was medically discharged in 2000 after the Police Superannuation Advisory Committee certified under s10B of the *Police Regulation (Superannuation) Act 1906* (NSW) that he was unfit for duties because he suffered from the infirmity of "chondromalcia (sic) patellae left knee" - a delegate of the Commissioner determined under s10B(3)(a) of the Act that the appellant's infirmity was caused by him being "hurt on duty" - in 2017, the appellant applied under s10(1A)(b) of the Act for his annual superannuation allowance to be increased and backdated to 2000 on the basis of an increase in his incapacity for work outside the Police Force, and for his certificate to be amended to include the infirmity of PTSD - the trustee of the Police Superannuation Scheme held that it was *functus officio*, and had no power to amend the certificate - the appellant commenced proceedings in the District Court - the District Court dismissed the proceedings - the appellant appealed - held: while there are different requirements pertaining to the two paths to certification under ss10B(1) and (2) respectively, those requirements serve a common goal of promoting finality and certainty in the scheme - the scheme is not one which contemplates the possibility of a disabled member of the Police Force who is discharged and is granted an annual superannuation allowance under s10, after meeting the requirements of s10B(1), applying subsequently and possibly many years later with reference to a different infirmity of body or mind - the Court did not accept the appellant's submission that the task of statutory interpretation here was greatly assisted by the proposition that the Act confers valuable rights on police officers in exchange for their services and it should be viewed as remedial or beneficial - while it may be accepted that a central purpose of the legislation is to confer benefits on members of the Police Force, the Act also imposes certain limitations on both eligibility to be granted those benefits and the amount of the benefits - nor was the appellant's preferred interpretation supported by the notion of "accrued rights", which simply begged the question as to the nature and content of those rights, which turned on a proper construction of the relevant provisions - appeal dismissed.
View Decision
[From Benchmark Friday, 15 March 2024]

Cronan as executrix of the will Regan v Coates [2024] WASC 61
Supreme Court of Western Australia
Whitby J
Succession - two of a deceased's ten children propounded an informal will signed by the deceased in 2021 which named them executors - the defendants were four of the deceased's other children and the deceased brother - the defendants said the deceased had not been of sound mind and lacked testamentary capacity when he signed the 2021 will and did not have knowledge of and approve the contents of that will - they propounded a 2010 will of the

deceased - the plaintiffs said that only one of the witnesses to the 2021 will had been in the same room as the testator when he signed, whereas the defendants did not admit that the testator had signed the 2021 will at all - the plaintiffs pleaded that the deceased's dealings with his solicitor showed that the deceased had understood the 2021 will and that it reflected his intentions - the defendants applied for that solicitor to be restrained from further acting for the plaintiffs in the proceedings - held: the courts do not lightly deprive litigants of their choice of lawyer, and it is only in exceptional and unequivocal circumstances that the Court will exercise its discretionary power to restrain solicitors from acting in a proceeding - in determining whether a solicitor continuing to act, if a material witness, would prejudice the administration of justice, the test is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that the solicitor should be prevented from acting in the interests of the protection of the integrity of the judicial process and the due administration of justice including the appearance of justice - there must be a realistic sense of impropriety about the circumstances which suggests that, unless the injunction is granted, the integrity of the judicial practice would be undermined - the solicitor would be required to give evidence material to the determination of contested issues before the Court - in order to facilitate a resolution of the contested issues in the action in a cost effective, timely and fair manner, the solicitor should be ordered to provide an affidavit deposing to the circumstances in which she prepared a draft will - it would prejudice the administration of justice if the solicitor continued to act for the plaintiffs - the solicitor would be restrained from continuing to act in the proceedings.

Cronan as executrix of the will Regan

[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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