

Monday, 15 May 2023

## Daily Banking A Daily Bulletin listing Decisions of Superior Courts of Australia

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### Executive Summary (One Minute Read)

**Ahern v Aon Risk Services Australia Limited** (NSWCA) - primary judge had not denied procedural fairness by hearing and determining applications for an extension of time and for leave to appeal without warning

**P Barnes (as executor of the estate of the late Lawrence Barnes) v D Barnes (No 3)** (NSWSC) - a contract between executors for the sale of land was established, but there had been no part performance and the contract was no longer on foot

**Hoho Property Pty Ltd v Bass Finance No 37 Pty Ltd (No 2)** (NSWSC) - certain provisions of loan agreements set aside under the *Contracts Review Act 1980* (NSW)

**Brown v Weidig** (NSWSC) - Court fashioned orders where the aboriginal father and European mother of a young suicide victim were in dispute as to how to dispose of his body

**McPaul v Massignani & Anor** (QSC) - trustees for sale should be appointed in respect of property owned by two sisters and the husband of one of them

### Summaries With Link (Five Minute Read)

**Ahern v Aon Risk Services Australia Limited [2023] NSWCA 91**

Court of Appeal of New South Wales

Ward P, Gleeson, & Brereton JJA

Procedural fairness - the applicants lost their home and possessions in a fire - they sued their insurance broker in professional negligence for under-insuring the property - the proceedings settled on terms that included payment to the applicants of \$1,375,000 plus costs - the broker paid the principal amount - the applicants applied under s353 of the *Legal Profession Act 2004* (NSW) for assessment of their costs, which they claimed exceeded \$1,700,000 - the costs assessor issued a certificate for just over \$1,200,000 - both the applicants and the broker filed applications for review - a Review Panel issued a certificate for just under \$1,200,000, being a reduction of about \$100,000 - the applicants appealed to the District Court as of right on a question of law under s384 - the District Court dismissed the appeal - the applicants sought judicial review of the District Court's decision in the Court of Appeal - the Court of Appeal dismissed that application - the High Court refused special leave to appeal - the applicants then filed a summons seeking leave to appeal from the Review Panel's decision on matters of fact or mixed fact and law under s385 - this application was more than two years and seven months out of time - the broker moved for orders setting aside the summons as out of time, or summarily dismissing the summons or striking it out - the hearing proceeded on the basis the applicants were seeking an extension of time - the primary judge rejected the applicants' application to have the broker's motion heard with the final hearing of the summons, refused the application for extension of time, and dismissed the summons - the applicants sought leave to appeal and also purported to appeal as of right - held: the primary judge correctly considered the strength of the applicants' case for leave to appeal as a factor relevant to whether an extension of time should be given, and did not purport to determine the application for leave on the merits - he had made clear how he intended to deal with the question of an extension of time - the question of an extension of time had been addressed in the written submissions of the parties exchanged before the hearing - there had therefore been no denial of procedural fairness - the fact that a party later thinks of an argument or answer that it did not advance when it had ample opportunity to do so at the hearing does not warrant granting leave to make further submissions - the primary judge had not applied an incorrect test for leave by requiring that the applicants demonstrate "a strongly arguable case" rather than "a fairly arguable case" - the primary judge's reference to "a strongly arguable case" did no more than reflect the well-established position that there is a relationship between the delay involved, the prejudice to the respondent, and the arguability of the case, and that here the delay was prolonged and the prejudice substantial - leave to appeal refused and purported appeal dismissed as incompetent.

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## **P Barnes (as executor of the estate of the late Lawrence Barnes) v D Barnes (No 3) [2023] NSWSC 491**

Supreme Court of New South Wales  
Schmidt AJ

Succession - two brothers and a sister were co-executors and equal beneficiaries of their late father's estate - an asset of the estate was real estate at Nimbin - one of the brothers lived on this property - the executors reached agreement that that brother would vacate the property so that it could be sold, and the Court made consent orders to that effect in the probate

proceedings - there were later discussions about the resident brother purchasing the property and certain chattels and agreement on purchaser prices, but the agreed purchase prices were never paid - the other brother sued to compel the resident brother to vacate the property - the resident brother defended this suit by relying on an alleged contract for him to purchase the property, and cross-claimed for specific performance of that contract - held: s54A of the *Conveyancing Act 1919* (NSW) precludes proceedings being brought on any contract for sale of land, unless the agreement or some memorandum or note thereof is in writing, signed by the party to be charged or by some other person authorised by that party - any variation to such a contract must also be evidenced in writing - sales of land are usually by a standard form contract following exchange, but other forms of sale contracts are possible, depending on the intention of the parties - such contracts require agreement between the parties - a contract for the sale of land might be evidenced by an exchange of correspondence - the evidence established that the parties reached agreement about the material terms of the purchase, reflected in their solicitors' written exchanges - the offers made and accepted in the solicitors' correspondence evidenced that the parties were content to be bound immediately and exclusively by the terms which they had agreed, even though they expected later to enter a deed of family arrangement dealing with other outstanding matters - there had been no part performance of this agreement - the resident brother had failed to complete the contract within a reasonable time and the contract was no longer on foot - even though the contract no longer being on foot did not preclude an order for specific performance, specific performance should not be ordered - the resident brother had not established he was ready, willing, and able to complete - orders of possession should be granted so the executors could sell the property.

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## **Hoho Property Pty Ltd v Bass Finance No 37 Pty Ltd (No 2) [2023] NSWSC 493**

Supreme Court of New South Wales

Rees J

Unjust contracts - the plaintiffs were a company, its sole director, and that sole director's wife - the couple had immigrated from Vietnam, and had run a butcher's shop, and had decided to venture into property development - they sued the lender and their broker - they sought to set aside the loan and security given by the company, and a guarantee given by the couple - they said they suffered from a special disadvantage due to limited English proficiency, basic level of education, and inexperience in finance and property development - they said there had been duress, illegitimate commercial pressure, and unconscionable conduct contrary to s20 of the Australian Consumer Law and s12GM of the Australian Securities and Investments Commission Act 2001 (Cth), and that they were entitled to relief under the *Contracts Review Act 1980* (NSW) - the defendant sought to enforce their rights under the finance documents - the Court had previously given judgment that included the rejection of the claims under the *Contracts Review Act* by the couple, as the only finance documents to which they were party were not in evidence (see Benchmark 27 April 2023) - the plaintiff's solicitors then drew the Court's attention to copies of those finance documents that were in evidence - the Court then gave further judgment dealing with the *Contracts Review Act* claim by the couple - s6(2) of the Act has the effect that

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the couple may not be granted relief so far as the contract was entered into in the course of or for the purpose of a trade, business or profession they carried on - this exception has been construed narrowly - the presence of a 'family element' in the transaction, such as a mortgage given by family members to secure a corporation's obligation, may bring the contract within the scope of the Act - that was the case here - there was a disconformity between the term of the loan and the expected time frame for construction of the development - the lender was clearly in a stronger bargaining position than the plaintiffs - the provisions of the contract were not the subject of negotiation prior to or at the time the contract was made - it was difficult to see how a \$40,000 per month management fee was reasonably necessary for the protection of the legitimate interests of the lender, particularly where the lender was already compensated by a higher interest rate in an event of default, and was and separately entitled to recover its costs and expenses associated with enforcement after any default - the couple had some business literacy, as they had had acquired some familiarity in matters of commerce by operating a business for some eight years from two retail shops together with a wholesale business - they were, however, inexperienced in matters of finance and property development - the finance documents *in toto* were extensive and complex - injustice arose in the circumstances - the Court was not satisfied that some provisions were unjust, but was satisfied that the higher interest rate and the management fee were unjust - those provisions declared void under the *Contracts Review Act*.

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## **Brown v Weidig [2023] NSWSC 281**

Supreme Court of New South Wales

Lindsay J

Succession - a 23 year old man committed suicide and died intestate - his father was an aboriginal man who was adamant that the custom of his region required that the deceased be buried on country with ceremonial rites of passage directed to such a burial - the mother was of European descent and wanted the body cremated - the parents were separated and the relationship between them was toxic - held: the Court has jurisdiction to make orders governing the disposal of a dead body, without the need for an application for a grant or probate or administration - the significance of the proposition that there is no property in the dead body of a human is that, in the determination of a dispute about disposal of a body, there is a strong public interest element that may prevail over private claims of any type - the Court's jurisdiction in that regard exists for the purpose of facilitating, so far as may be reasonably practicable, an orderly disposal of the mortal remains of a person whose dignity, as a person, should be respected - in the absence of legislation governing the outcome of a case, the Court is required, in the determination of a dispute as to who has carriage of disposal of a body, to exercise a discretion taking into account a range of factors, including the logistics and available funding for disposal of the body, the wishes or preferences of the deceased, if known, the wishes or preferences of the community or communities, in which the deceased lived (including, but not necessarily limited to, members of family), any cultural or spiritual factors material to how the deceased lived life, and the accessibility of the deceased's mortal remains to those who seek to

mourn a death or to remember - if there is an executor, that executor has the right to arrange for burial - where no executor is named, the person with the highest right to take out administration will have the same privilege as the executor - apart from appointing an executor and any rights existing under statute, a person has no right to dictate what will happen to his or her body - where two or more persons have an equally ranking privilege, the practicalities of burial without unreasonable delay will decide the issue - the father and mother (and other warring family members) should be permitted to live in separation rather than within a legal framework that might require ongoing supervision by the Court - the solution, in the Court's opinion, was to allow the mother to proceed with cremation of the deceased's body subject to her undertaking to the Court to share his ashes with the father should he, upon reflection, want to have ashes to dispose of on country or as he may otherwise choose.

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## **McPaul v Massignani & Anor [2023] QSC 98**

Supreme Court of Queensland

Bowskill CJ

Real property - two sisters and the husband of one of them bought a 20 hectare property in Numinbah Valley as tenants in common, with one sister and her husband owning 50% and the other sister owning 50% - the single sister's plans for the property were thwarted by planning restrictions, and she wished to sell the property - she brought an application under s38 of the *Property Law Act 1974* (Qld) for the appointment of a statutory trustee to sell the property - she sought the appointment of a named solicitor as trustee - the couple opposed the order and said that the applicant was estopped from bringing that application - they also said the application was defective as two trustees were required, and the solicitor did not have relevant experience - held: the purpose of orders for sale by statutory trust is to provide a statutory mechanism for terminating the co-ownership of land when the co-owners fail themselves to agree on the manner in which the co-ownership shall be terminated - the evidence as to estoppel, even taken at its highest, reflected no more than aspirational statements that all three parties considered the property to be perfect for their needs, hoped they would live there for a long time, and that it could benefit their children - there was no evidence the applicant had made any statement that could be taken as an express or implied representation that she would not seek to have the property sold if the need arose - the evidence did not support an equitable estoppel - trustees for sale should be appointed - there should be two of them, having regard to s38(1) and (3) - there was no reason why a solicitor was not suitably qualified to act as a trustee for the sale of the property - there is no necessary qualification for such a trustee; the person simply needs to understand their role, and be responsible for undertaking in a diligent way the role of effecting the sale of the property, in accordance with the Court's order - parties to be heard further as to the identity of the trustees.

[McPaul](#)

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