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Daily Civil Law
A Daily Bulletin listing Decisions of Superior Courts of Australia

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (One Minute Read)

Australian Securities and Investments Commission v Zurich Australia Limited (No 2) (FCA) - insurer had not breached its duty of utmost good faith in the way it avoided an income protection policy for fraud where the insured had made a number of non-disclosures (I B)

In the matter of BH Holdings QLD Pty Ltd (NSWSC) - plaintiff's nominee as liquidator appointed in preference to defendant's nominee, in accordance with the Court's usual practice, although cost and perceived conflict considerations also influenced this result (I B C)

Reeves v Reeves (NSWSC) - disappointed son who had only been given a small amount of a larger farming property failed on issues of the construction of the will and rectification, but succeeded in estoppel (I B)

210 Hawthorn Road Pty Ltd v Ellinson & Ors (VSC) - plaintiff had failed to establish a proposed modification of a restrictive covenant would not substantially injure persons entitled to its benefit (I B C)

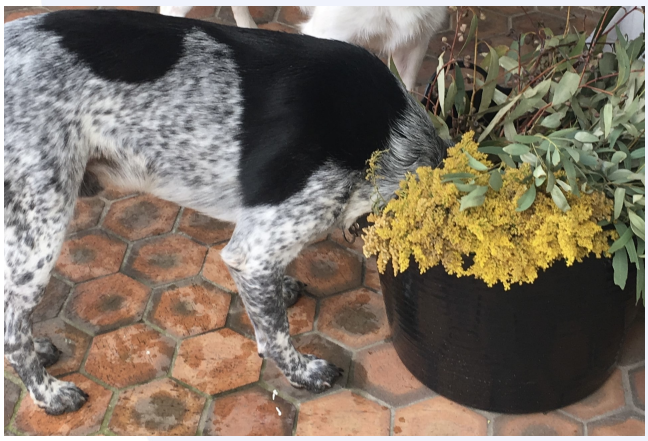
Priolo v Nguyen [No 3] (WASC) - statement of claim pleading nuisance, negligence, and trespass not struck out in dispute between neighbours arising from construction work (B C I)

Chatterton v Tasmania (TASSC) - Magistrate erred in convicting bus driver of causing death

by negligent driving where the bus driver did not know the bus was not fitted with ABS (I)

HABEAS CANEM

Camouflage



Summaries With Link (Five Minute Read)

Australian Securities and Investments Commission v Zurich Australia Limited (No 2) [2023] FCA 1641
Federal Court of Australia
Jackman J
Insurance - an insurer issued a policy for income protection and life insurance - the insured informed the insurer she had made workers' compensation claims in 2001 for depression and an injury on her right side in 2001 and 2003 - the insured injured her right shoulder in a workplace incident and claimed income protection, and her supporting documentation disclosed a previous right shoulder injury which had not been disclosed previously - the insurer accepted the claim, subject to ongoing assessment - inquiries with a hospital revealed further non-disclosures - after a process in which the insured was invited to comment, the insurer avoided the income protection cover from inception on the basis of fraud - ASIC commenced proceedings, seeking declarations under s75A of the *Insurance Contracts Act 1984* (Cth) that the insurer breached the duty of utmost good faith implied by s13(1), the imposition of a civil pecuniary, and an order for a corrective notice - held: the duty of utmost good faith is not limited to dishonesty, and may require an insurer to act with due regard to the legitimate interests of an insured, as well as to its own interests, and may require an insurer to act, consistently with commercial standards of decency and fairness, with due regard to the interests of the insured - the duty of utmost good faith depends on the factual circumstances of the case - ASIC expressly and repeatedly conceded that the insurer had formed a reasonable conclusion that the insured had fraudulently not disclosed, and limited its case to the manner or process adopted in reaching that decision - ASIC's claim that the insurer had breached its duty of good faith by avoiding the insured's cover without embarking on further inquiries or consideration must be rejected - the insurer had provided the insured with ample opportunity to explain the circumstances in which the misrepresentations and non-disclosures occurred and whether they should be regarded as fraudulent - the duty of utmost good faith did not require that the insurer expressly state that it was concerned that the insured may have been dishonest - the insurer had not failed to act with the utmost good faith by failing within its avoidance letter (at a time when the insured was represented by solicitors) to inform the insured of her rights and the availability of processes, both internally and externally, to dispute or appeal the decision to avoid the income protection cover - ASIC's case dismissed with costs.
Australian Securities and Investments Commission (I B)

In the matter of BH Holdings QLD Pty Ltd [2024] NSWSC 132
Supreme Court of New South Wales
McGrath J
Corporations law - trustee companies and trusts were created for the purposes of pursuing the Burnett Heads Marina Project - the relationship between the principals and their respective corporate vehicles broke down - one of these corporate vehicles, as shareholder of the holding and operating companies, sought that the holding and operating companies be wound up - the

parties were agreed except as to the identity of the liquidators - held: it is the practice of the NSW Supreme Court that, all things being equal, it will appoint the plaintiff's nominee as liquidator where there is a contest to the appropriate identity of the appropriate appointee, and there is nothing to be said between the competing nominees as to their respective fitness, qualifications or cost - liquidators must be independent and have the appearance of independence - all other things being equal, the court will select an option that is likely to involve less cost - in this case, there did not appear to be any difference between the respective fitness or qualifications of the proposed liquidators - there was, however, a difference in the costs that have been put forward by each of the prospective liquidators - the liquidators nominated by the defendant shareholder were more expensive than those nominated by the plaintiff - it was also clear that in the present case, without making any aspersions or drawing any negative inferences at all, there were perceptions of conflict having to do with the relationship between the solicitors for the defendant shareholder and the liquidators proposed by that shareholder (although there was absolutely no suggestion, and nor did the Court accept, that those solicitors would do anything other than act in accordance with their professional obligations) - however, perceptions can be important, particularly in the circumstances where a significant amount of money as owing to the plaintiff shareholder as a substantial creditor - further, there was potential perception of conflict in that the liquidators proposed by the defendant shareholder proposed to use advisors who were a major shareholder in a marina company that may be a proposed purchaser of the project - the Court therefore followed its normal practice, and appointed the plaintiff's nominated liquidators.
View Decision (I B C)

Reeves v Reeves [2024] NSWSC 134
Supreme Court of New South Wales
Meek J
Succession - a deceased left the majority of valuable farming land to one of her two sons and only two lots to the other son - the other son commenced proceedings, claiming that, on the will's proper construction, the reference to two lots should be construed as a reference to all lots north of a dividing road, or alternatively that the will should be rectified so as to provide this, or alternatively that he was entitled to the land under the principles of estoppel - held: traditionally, the Court does not rectify a document until it has first construed it - however, the NSW Supreme Court has for over 40 years permitted an approach to construction and rectification claims such that it may consider a rectification claim effectively together with a construction claim, and rectify a document out of an abundance of caution - the object of construction of a will is to give effect to what can be ascertained, having regard to admissible extrinsic evidence, the testator intended by the words he used - under the general law, direct extrinsic evidence of the testator's actual intentions is limited to equivocations, which arise where the testamentary language may be applied equally to each of two or more persons or things, and the will as a whole and the available surrounding circumstances do not permit the Court to determine which of the alternatives was intended by the testator - where the language is lengthy or obscure, or the effects of the literal reading and the reasoning impliedly underlying it are startlingly unlikely, the

scheme of dispositions is very important - however, if the terms of the will are perfectly clear, such search for a scheme may be of little use - the terms of the will were clear, and, on its proper construction, only the two named lots had been left to the plaintiff son - the will also should not be rectified - however, the plaintiff's case in estoppel succeeded in respect of a number of lots - the modern approach is to avoid use of presumptions as to whether or not some family arrangements are intended to give rise to legal obligations, and it is more important to ask "who bears the onus of proof?" - the party relying on the estoppel must establish that it would have acted differently in the absence of the relevant encouragement - in estoppel by encouragement, there must be reliance in fact, and the legal burden of proving reliance never shifts.
View Decision (I B)

210 Hawthorn Road Pty Ltd v Ellinson & Ors [2024] VSC 61
Supreme Court of Victoria
Ierodiaconou AsJ
Restrictive covenants - the plaintiff was the registered proprietor of a large residential block in Caulfield North, on the corner of a main road and a cul-de-sac - it sought modification of a restrictive covenant under s84(1)(c) of the *Property Law Act 1958* (Vic) - the covenant restricted the number of dwellings to one private house - the plaintiff wanted to build five dwellings on the land as part of a larger development spanning neighbouring lots of land owned by the plaintiff on the main road - eight parties initially lodged objections, and four remained as defendants by the time of hearing - held: the plaintiff had the burden of proving as a matter of fact that the proposed modification would not substantially injure those with the benefit of the covenant - a substantial injury must be a detriment that is real and not fanciful, which precludes vexatious opposition cases where there is no genuineness or sincerity or bona fide opposition on any reasonable grounds - the substantial injury relates to practical benefits, being any real benefits to the person entitled to the benefit of the covenant, and it is not sufficient for a plaintiff to merely prove that there will be no appreciable decrease in the value of the property that has the benefit of the covenant - the Court may also consider the precedent effect of the modification, in that it may be used to support further applications resulting in further encroachment - the covenant here conferred the benefit of low-density housing with the restriction of one dwelling house - the Court rejected the plaintiff's submission that the covenants on the Grandparent Title were established on an ad hoc or piecemeal basis - the Court also rejected the plaintiff's submission that the neighbourhood should not be characterised as low density - as a consequence of the covenant, the short cul-de-sac was quiet and spacious, which had immense personal value and amenity to the defendants - the subject land was integral to the quiet, spacious, low-density character of the neighbourhood and especially the cul-de-sac - the plaintiff had failed to establish that the proposed modification would not substantially injure persons entitled to the benefit of the covenant - application dismissed.
210 Hawthorn Road Pty Ltd (I B C)

Priolo v Nguyen [No 3] [2024] WASC 47

Supreme Court of Western Australia
Whitby J
Torts - plaintiffs owned the property at Dalkeith, and the first defendant and his wife owned the property next door - the properties were separated by a single leaf brick wall approximately 90mm wide, which was located entirely within the plaintiffs' property - the first defendant was a registered builder and the City of Nedlands granted him a permit for construction of a new dwelling and swimming pool on his property - demolition and construction took place on the first defendant's property, including knocking down the single storey residence, erecting a multi-storey residence in replacement, and constructing a swimming pool - the plaintiffs sued in nuisance, negligence, and trespass (particularly regarding their strip of land on the other side of the brick wall) - the defendants applied to strike out the whole of the statement of claim, or alternatively various paragraphs and prayers for relief, on the basis that it disclosed no reasonable cause of action and was embarrassing - held: the essential functions of a pleading are to define and limit the issues for decision, to provide the basis for determining discovery and the admissibility of evidence for trial, and to ensure a fair trial by putting the other side on notice of the case it must meet - a statement of claim must not plead allegations at too high a level of generality - a statement of claim must state specifically the relief or remedy claimed - the Court should proceed with caution before striking out a pleading on the ground that it does not disclose a reasonable cause of action - where it is alleged the pleadings disclose reasonable cause of action, the question not whether the facts pleaded are in themselves sufficient to give rise to a cause of action, but rather whether it would be open to the party (on its pleadings) to prove facts at the trial that would constitute a cause of action - to establish a cause of action of trespass against land, the plaintiffs had to plead they were entitled to possession of land and that the first defendant entered the land without their consent - contumelious disregard is not an element of trespass to land, and the defendants are at liberty, at trial, to assert their conduct was absent negligence and was instead a byproduct of unintentional conduct - trespass paragraphs not struck out - it was reasonably arguable that the plaintiffs were entitled to mesne profits - as to nuisance, the vibration damage pleaded put the defendants on notice of the case they must meet at trial - it was also open to the plaintiffs to argue at trial that reasonable foreseeability is an objective test that does not require them to plead specific knowledge of the defendants - it was also open to the plaintiffs, on the statement of claim, to prove facts at trial which would constitute a cause of action in negligence against each of the defendants - strike out application dismissed.
Priolo (B C I)

Chatterton v Tasmania [2024] TASSC 4
Supreme Court of Tasmania
Martin AJ
Criminal negligence - following a trial, the applicant was a bus driver convicted by a Magistrate of two counts of causing death by negligent driving - the applicant filed a motion to review the decision of the magistrate - held: s107(1) of the *Justices Act 1959* (Tas) provides that a person who is aggrieved by "an order" may move the Supreme Court to review the order - s116

provides that "order includes conviction, dismissal of a complaint, determination, and adjudication" - on its face, the wording of s116 was wide enough to encompass the finding by the magistrate that both charges were proved - *res ipsa loquitur*, while a convenient tag for the process whereby in civil cases inferences of negligence can be drawn on the balance of probabilities from the fact of an untoward happening has no application to a criminal prosecution - the mere fact that a driver leaves the road or crosses to the wrong side of it and collides with another vehicle being properly driven cannot justify the drawing of an inference that such an event was necessarily caused by negligent driving - however, the facts may be so strong that the only inference is that there has been careless driving unless and until something is suggested by a defendant by way of explanation - the circumstances here did not involve facts "so strong" that the only inference open was an inference of negligence in applying force to the brake pedal - from the perspective of the applicant, and the reasonably prudent driver, the applicant was driving a relatively modern bus provided by a company which serviced a school run - the applicant was not informed that the bus was not fitted with an anti-lock braking system - there was no occasion for her to make such an enquiry, and a reasonably prudent driver would not have made such an enquiry - there was no evidence that the risk of the wheels locking under the pressure of braking was reasonably foreseeable - there was no basis for a finding that, appreciating a risk of locking, the reasonable and prudent driver would have applied less force than the force applied by the applicant - application allowed, conviction and sentence set aside, and verdict of not guilty recorded.
Chatterton (I)

Poem for Friday

The Song My Paddle Sings

By: (Emily) Pauline Johnson (1862-1913)

West wind, blow from your prairie nest,
Blow from the mountains, blow from the west.
The sail is idle, the sailor too;
O! wind of the west, we wait for you.
Blow, blow!
I have wooed you so,
But never a favour you bestow.
You rock your cradle the hills between,
But scorn to notice my white lateen.

I stow the sail, unship the mast:
I wooed you long but my wooing's past;
My paddle will lull you into rest.
O! drowsy wind of the drowsy west,
Sleep, sleep,
By your mountain steep,
Or down where the prairie grasses sweep!
Now fold in slumber your laggard wings,
For soft is the song my paddle sings.

August is laughing across the sky,
Laughing while paddle, canoe and I,
Drift, drift,
Where the hills uplift
On either side of the current swift.

The river rolls in its rocky bed;
My paddle is plying its way ahead;
Dip, dip,
While the waters flip
In foam as over their breast we slip.

And oh, the river runs swifter now;
The eddies circle about my bow.
Swirl, swirl!
How the ripples curl

In many a dangerous pool awhirl!

And forward far the rapids roar,
Fretting their margin for evermore.
Dash, dash,
With a mighty crash,
They seethe, and boil, and bound, and splash.

Be strong, O paddle! be brave, canoe!
The reckless waves you must plunge into.
Reel, reel.
On your trembling keel,
But never a fear my craft will feel.

We've raced the rapid, we're far ahead!
The river slips through its silent bed.
Sway, sway,
As the bubbles spray
And fall in tinkling tunes away.

And up on the hills against the sky,
A fir tree rocking its lullaby,
Swings, swings,
Its emerald wings,
Swelling the song that my paddle sings.

Emily Pauline Johnson, a Canadian Indian poet was born on 10 March 1862. She was the daughter of a Mohawk chief. Her mother was English. Her poetry was first published when she was a teenager under the Indian name “Tekahionwake”. She toured the US and England giving recitals of her poetry, wearing a buckskin dress. The Song My Paddle Sings was one of her best-known poems and talks of the the determination required for every journey in life. She and her contemporaries started to define a new period of literature in Canada. **Pauline Johnson** died on 7 March 1913 in Vancouver, B.C.

The Song My Paddle Sings, sung by the choir of Western University, London, Ontario, Canada, the **UWO Les Choristes**
https://www.youtube.com/watch?v=k8WOEin1xng

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