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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 Competition and Consumer Commission v Meta Platforms, Inc. (formerly Facebook, Inc.) (No 2) (FCA) - Court refused to stay civil proceedings brought by the ACCC against Facebook until the termination of criminal proceedings against Facebook dealing with the same allegations (I B)

Maria Oliveira by her tutor Ivo De Oliveira v John Antonio Oliveira (No 2) (NSWSC) - tutor who had brought family provision proceedings without authority, which had completely failed, ordered to pay the defendants' costs personally, without recourse to the plaintiff's estate (I B)

Stekovic v Radovanovic (NSWSC) - exchange of emails between solicitors constituted a binding agreement within the first category in *Masters v Cameron*, largely based on the communications being marked "without prejudice save as to costs" (I B C)

Birchip Holdings Pty Ltd v Arrowsmith Rd Pty Ltd (VSC) - Court refused to restrain sale of property by a joint venture vehicle, where one of the two joint venturers wanted to buy either the property or the joint venture vehicle (I B C)

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Summaries With Link (Five Minute Read)

Australian Competition and Consumer Commission v Meta Platforms, Inc. (formerly Facebook, Inc.) (No 2) [2023] FCA 1234

Federal Court of Australia

Cheeseman J

Civil procedure - the ACCC commenced proceedings against Facebook, alleging that it had displayed advertisements targeted to Australian users featuring fake endorsement by various public figures of different investment schemes, typically involving cryptocurrency - Facebook sought that the proceedings be stayed pending the resolution of criminal proceedings dealing with the same subject matter against a different Facebook entity in the Magistrates' Court of WA - held: the Court has a wide power to stay a proceeding in the interests of justice - this is an incident of the Court's power to control its own proceedings and also finds statutory support in s23 of the *Federal Court of Australia Act 1976* (Cth) - the discretion to grant a stay is a wide one and the matters that might individually, or in combination, be relevant to the exercise of discretion are not rigid or closed - the principles relevant to the exercise of the discretion to grant a stay are not different in the case of a proceeding brought by a regulator from those that apply in the case of a proceeding brought by a private plaintiff - the question for the Court is whether the interests of justice require a stay - in considering what the interests of justice require, the Court must weigh the risk of real prejudice to the accused against the prejudice that a stay of the civil proceeding would occasion - if the applicant for the stay establishes relevant prejudice as a matter of fact, then it is necessary for the Court to weigh the competing prejudices - a plaintiff is prima facie entitled to have his, her or its civil action tried in the ordinary course, and a stay therefore requires justification on proper grounds with the applicant for a stay bearing the burden of demonstrating proper grounds - the following factors may be relevant: (1) prejudice to the accused's right to silence or privilege against self-incrimination; (2) the possibility of publicity that might reach and influence jurors; (3) the possibility of protective orders being made (such as an order made under s128 of the *Evidence Act 1995* (Cth) or a non-publication or suppression order) that may ameliorate prejudice - in an appropriate case, the proceeding may be allowed to proceed to a certain stage and then be stayed pending determination of the criminal proceeding - if granted, a stay should operate only for the minimum period required in the interests of justice - the degree of overlap in the subject matter between the two proceedings is relevant both to the risk of prejudice and the efficacy of any protective orders that the Court may make in lieu of granting a stay - the central allegations in both proceedings were the same, although the civil proceeding covered a longer period of time and a grater range of fake celebrity ads - protective orders would be capable of ensuring that the criminal prosecutor would not gain access to the product of any further interlocutory processes in the civil proceeding, including having access to Meta's defence - the Court was not persuaded that the presumptive prejudice in the criminal proceeding was such that the interests of justice required an immediate stay of the civil proceeding - in weighing the competing factors, the Court was not satisfied that the interests of justice at this time required an immediate stay of all interlocutory steps in the civil proceeding - application dismissed.

[Australian Competition and Consumer Commission](#) (I B)

Maria Oliveira by her tutor Ivo De Oliveira v John Antonio Oliveira (No 2) [2023] NSWSC 1473

Supreme Court of New South Wales

Kunc J

Costs in family provision cases - Luis Oliveira died, leaving his entire estate to his widow, Felicidade, who was an 82-year-old woman now living in a nursing home and suffering from Alzheimer's Disease - one of their children (a 52-year-old non-verbal severely disabled woman), by one of her brothers as tutor, brought proceedings out of time under the *Succession Act 2006* (NSW) for provision from Luis' estate - two other brothers were administrators of the estate, and also the enduring guardians and attorneys for Felicidade - it was common ground that all of the plaintiff's current needs were being met by her NDIS package and Commonwealth pension - the case for the plaintiff was argued on the sole basis that provision for contingencies, quantified by an open offer at \$125,000, should be made for the plaintiff from the estate - the Court dismissed the proceedings, holding that there was no evidence of any adverse risk concerning the continuation of the plaintiff's NDIS package or her Commonwealth pension, and, weighing the competing claims of the plaintiff, whose needs were being met and who had no case for contingencies, against the widow's claim, and taking into account the size of the estate, and the widow's current circumstances and future needs, inadequate provision had not been made for the plaintiff under Luis' will - the Court now considered whether the brother who acted as the plaintiff's tutor should be required to pay the defendants' costs of the proceedings personally without recourse to the plaintiff's estate - held: the proceedings had been irregularly brought by the brother, purportedly as the plaintiff's tutor, as the brother was not entitled to bring proceedings in that or any other capacity on behalf of the plaintiff, because the Trustee and Guardian, which was responsible for the management of the plaintiff's estate under the *NSW Trustee & Guardian Act 2009* (NSW) did not consent to these proceedings being brought and had never declined to act as the plaintiff's tutor - it was almost certain that the proceedings would have been stayed as an abuse of process if the irregularity of the brother's lack of authority to act on behalf of the plaintiff had been drawn to the Court's attention - this was a reason to require the brother to pay the defendants' costs without recourse to the plaintiff's estate - however, even if this were not the case, in the exercise of its general discretion as to costs the Court was satisfied that the just and proper outcome was an order to that effect - a tutor is personally liable to pay the costs of the proceedings in the absence of a protective order, which liability exists whether a costs order is expressed to be made only against the party for whom the tutor was appointed, or against the tutor himself or herself - the brother was not acting in his own interest, but that could be said of any tutor or any person purporting to act as a tutor - the brother had no authority to bring and prosecute the proceedings on behalf of the plaintiff, who, as a legally incapable person, had no responsibility for initiating or conducting the litigation - the decision to bring and prosecute the proceedings was entirely the brother's - the proceedings failed completely, and the brother did not seek to rely on any advice he may have received regarding prospects of success - both in fact and law the proceedings were brought

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and prosecuted by the brother alone and he should bear the costs consequences personally, and without recourse to the plaintiff's estate.

[View Decision](#) (I B)

Stekovic v Radovanovic [2023] NSWSC 1471

Supreme Court of New South Wales

McGrath J

Contracts - a married couple claimed an equitable interest in property at Queanbeyan owned by the brother of the wife, arising from an alleged agreement between them, the parents of the wife, and the brother's former wife, to develop the property for the benefit of all of them - the married couple reached agreement with the brother to enable the property to be sold, on the basis that the brother's solicitors would hold the net proceeds of sale in their trust account - the married couple then contended that the parties had settled their dispute as to how to distribute the net proceeds of sale, through the exchange of letters marked "without prejudice save as to costs" between their respective solicitors - the solicitors' correspondence contained expressions of offer and acceptance, but contemplated that there would be a deed of settlement - the married couple commenced proceedings, seeking specific performance of the alleged agreement - held: the Court ascertains whether parties intend to create binding legal relations objectively, that is, by determining whether a reasonable person in the position of the parties would have taken them to have intended to contract - this is fact-based, to be found in all the circumstances, including by drawing inferences from the parties' words and conduct in making their agreement - regard can be had to the commercial circumstances in which the parties exchanged their communications and to the subject matter of the supposed contract - this was a *Masters and Cameron* type of case, which occurs where whether the question turns on whether the parties intended to be bound immediately (by an oral agreement or an informal written one) or did not intend to make a concluded bargain unless and until they executed a formal instrument - in *Masters and Cameron*, the High Court identified three categories: (1) the parties intend to be bound immediately but propose to have the terms restated in a fuller or more precise form; (2) the parties have agreed terms but have made performance conditional upon the execution of a formal contract; and (3) the parties do not intend to be bound unless they execute a formal contract - subsequent cases have introduced: (4) the parties have entered a binding agreement on specified terms, and on such other terms as are either subsequently agreed or determined by the Court - the Court may have regard to the parties' subsequent communications and other conduct to assess what their intention had been - it is not necessary to identify a precise offer or acceptance; nor to identify a precise time at which an offer or acceptance can be identified - an agreement that is incomplete will not give rise to an enforceable contract, no matter what the parties may think - whether a communication accepts the terms of an offer without modification, or instead varies its terms, is a question of construction - in this case, by marking the germane communications "without prejudice save as to costs", it was clear that the parties were attempting to finally settle serious claims that had been made for which there were serious responses given without the need to resort to court proceedings - in context, the words used in the emails revealed an intention to be immediately

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bound - the post-contractual communications are consistent with there being a binding settlement having been reached - the agreement was binding.

[View Decision](#) (I B C)

Birchip Holdings Pty Ltd v Arrowsmith Rd Pty Ltd [2023] VSC 681

Supreme Court of Victoria

Waller J

Sale of land - Birchip owned half the shares in Arrowsmith Rd Pty Ltd - Sadik was the sole director and secretary of Arrowsmith, and owned the other half of the shares in Arrowsmith through a company - Arrowsmith was a special purpose vehicle incorporated to acquire and hold property which is vacant land under 19 certificates of title, that is likely to be a future residential subdivision - Agrawal, the sole director of Birchip, caused Birchip to inject \$600,000 of capital into Arrowsmith - Arrowsmith acquired the property for \$1.85million - Sadik told Agrawal he wanted to sell the Property, primarily as a result of "internal family reasons" - the correspondence between Sadik and Agrawal suggested that it was initially common ground between the two that the property would be sold to a third party - Agrawal then raised that he would like to make an offer to buy Sadik's shares in Arrowsmith - Arrowsmith executed a contract of sale for the property - the first mortgagee of the property emailed a copy of the contract to Agrawal, who contended that he was not aware of the contract before that time - Arrowsmith and the purchaser refused to delay settlement - Birchip commenced proceedings, seeking an interlocutory injunction against Arrowsmith and Sadik, restraining them from completing the sale - held: the Court needed to be satisfied that there was a serious question to be tried, and that the balance of convenience favoured the grant of the injunction - Birchip had not demonstrated that it has any direct entitlement to, or proprietary interest in, the property, such as may be supported by a caveat, or any entitlement to have its offer to purchase the property from Arrowsmith or Sadik's shares in Arrowsmith considered by Mr Sadik, such as in the nature of a right of first refusal - a director of a company owes duties to the company as a whole, not to any particular shareholders - Birchip therefore could not say that Sadik had to take its interests into account when considering whether it was in Arrowsmith's interests to sell the property - the Court was not satisfied that Birchip had made out a prima facie case supporting its application for an injunction, in the sense that, if the evidence remained as it was, there was a probability that, at the trial of the proceeding, Birchip would be held entitled to relief that would include the right to set aside, or permanently restrain settlement of, the contract of sale - Birchip had not demonstrated a sufficient likelihood of success to justify the preservation of the status quo pending trial - further, the balance of convenience did not weigh in favour of granting the interlocutory injunction - any claims brought by Birchip, if successful, would likely sound in damages, and, in the circumstances, Birchip had not demonstrated that damages would not be an adequate remedy for the loss it would suffer if an interlocutory injunction were not granted - application for an interlocutory injunction refused.

[Birchip Holdings Pty Ltd](#) (I B C)



Poem for Friday

The Tenant-For-Life

By: Thomas Hardy (1840-1928)

The sun said, watching my watering-pot
"Some morn you'll pass away;
These flowers and plants I parch up hot -
Who'll water them that day?"

"Those banks and beds whose shape your eye
Has planned in line so true,
New hands will change, unreasoning why
Such shape seemed best to you.

"Within your house will strangers sit,
And wonder how first it came;
They'll talk of their schemes for improving it,
And will not mention your name.

"They'll care not how, or when, or at what
You sighed, laughed, suffered here,
Though you feel more in an hour of the spot
Than they will feel in a year

"As I look on at you here, now,
Shall I look on at these;
But as to our old times, avow
No knowledge - hold my peace! . . .

"O friend, it matters not, I say;
Bethink ye, I have shined
On nobler ones than you, and they
Are dead men out of mind!"

Thomas Hardy was born on 2 June 1840 in the United Kingdom. His father Thomas was



a builder, and his mother Jemima educated Thomas until he started school at the age of 8. Thomas later was educated at Mr Last's Academy for Young Gentlemen, where he excelled. He was an apprentice architect from age 16, but later studied at King's College London. He was influenced, in the realist tradition by Charlotte Bronte, George Eliot and Charles Dickens. He championed the cause of rural workers, and was interested in social reform, rebelling against the class structure in the UK. He adapted novels, for theatre, wrote poetry and novels. He became involved in the protection of ancient buildings from developers. His novels include *Far from the Madding Crowd* (published 1874) and *Tess of the D'Urbervilles* (published in 1891). He died on 11 January 1928 from "cardiac syncope" and "old age" (as recorded on his death certificate). On 16 January 1928 Thomas Hardy's ashes were buried in Poets' Corner in Westminster Abbey, next to the grave of Charles Dickens.

Thomas Hardy's Funeral (1928)

<https://www.youtube.com/watch?v=QWHQTyxGcY0>

Alan Bates reads "the Going" by Thomas Hardy

<https://www.youtube.com/watch?v=BRkpEC0nli4>

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