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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)

Blake & Anor v Fox (EWHC) - an actor and anti-“woke” activist was liable in defamation for calling gay advocates paedophiles in a Twitter exchange - the advocates were not liable for calling him racist, due to a lack of serious harm (I B)

Alumina and Bauxite Company Ltd v Queensland Alumina Ltd (FCA) - allow subsidiaries of a Russian company to participate in an alumina joint venture would violate Commonwealth sanctions against Russia imposed after the invasion of Ukraine (I B C)

A-Civil Aust Pty Ltd v Ceerose Pty Ltd (NSWCA) - adjudicator under the *Building and Construction Industry Security of Payment Act 1999* (NSW) had failed to afford procedural fairness by making a decision on a basis that neither party put and that was not properly anticipated (I B C)

CBX v QWJ (QSC) - Supreme Court appointed trustees for sale of property of former de facto partners - transfer to Federal Circuit and Family Court to allow an application to adjust property interests refused as the defendant had not shown a relationship of at least two years (I B)

Tutt Bryant Group Limited v Piggott (WASC) - misleading or deceptive conduct case where three out of five alleged representations were unsupported or inadequately pleaded - summary judgment for defendant refused but strike out application allowed in part (I B C)

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Piscioneri v Whitehouse (TASSC) - challenge to will on grounds of lack of testamentary capacity, undue influence, and breach of an agreement for mutual wills - solicitors that drafted the will not restrained from acting for the parties propounding the impugned will (I B)

HABEAS CANEM

Rolling in the green



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Summaries With Link (Five Minute Read)

Blake & Anor v Fox [2024] EWHC 146

Kings Bench Division of the High Court of England and Wales

Collins Rice J

Defamation - Fox was a well-known English actor who had become radicalised and politically active in opposition to what he regarded as "woke" culture - there was an exchange on what was then called Twitter - Fox called for a boycott of Sainsbury's supermarket over its employee diversity and inclusion policy, which he said was racist - the plaintiffs called Fox a racist - Fox called them paedophiles - the plaintiffs sued and Fox counterclaimed - held: as to the plaintiffs' need to show serious harm, it was hard to think, in contemporary Britain, of a more grave allegation than that involving the sexual abuse of children - this was a mass publication, as Fox's allegations were inherently eye-catching and startling, and in the context of the response to his attention-grabbing tweet to boycott Sainsbury's - Fox had had a large Twitter following, and was not just a prominent actor but an emerging politician on the national stage - the plaintiffs were not only both gay men, but had a public profile as such as gay advocates, and had worked with children where sexual propriety and a reputation for such was of the essence - it was more likely than not that the paedophile tweets caused, or were likely to cause, serious harm to the plaintiffs reputations - Fox's "reply to attack" qualified privilege defence failed, as this defence not a licence to defame - as Fox raised no other defences, the plaintiffs' claim succeeded - as to Fox's need to show serious harm, an allegation of racism is also grave, but the allegations here were opinions offered in the context of a lively contest of ideas, which Fox had himself provocatively stimulated, about what constitutes being racist - the Court was not satisfied that the tweets about Fox more probably than not caused, or were likely to cause, serious harm to his reputation - Fox's counterclaim therefore failed, and the Court declined the request to make findings about the honest opinion and substantial truth defences to Fox's counterclaim - although the parties would like to leave Court with findings vindicating their positions as to whether Fox was a racist, or whether the plaintiffs genuinely thought so and an honest person could have thought so too, the Court was content to conclude that the tweets claiming Fox was racist were not defamatory because of a lack of serious harm, and leave wider issues about what constitutes racism where there are racially cognisant policies for another day and for the political arena.

[Blake & Anor](#) (I B)

Alumina and Bauxite Company Ltd v Queensland Alumina Ltd [2024] FCA 43

Federal Court of Australia

O'Bryan J

Contracts - in response to the Russian invasion of Ukraine, the Commonwealth imposed sanctions against Russia and certain Russian business people under the *Autonomous Sanctions Regulations 2011* (Cth) under the *Autonomous Sanctions Act 2011* (Cth) - these included prohibitions against supplying, selling, or transferring alumina directly or indirectly to Russia, for use in Russia, or for the benefit of Russia; or directly or indirectly making an asset

available to or for the benefit of two Russian businessmen: Deripaska and Vekselberg - there was a joint venture under which Queensland Alumina would supply a percentage of the capacity of its Gladstone alumina refinery to three subsidiaries of a Russian company and five subsidiaries in the Rio Tinto group, and under which the Rio subsidiaries would supply bauxite to the Russia subsidiaries - in reliance on the sanctions, Queensland Alumina and the Rio subsidiaries excluded the Russia subsidiaries from the joint venture - the Russia subsidiaries sued Queensland Alumina and the Rio subsidiaries seeking declaratory and injunctive relief and damages, claiming that carrying out the joint venture obligations would not violate the sanctions - held: on the balance of probabilities, Queensland Alumina delivering alumina to the relevant Russian subsidiary would have violated the sanctions, as (1) the alumina would be transferred to Russia, and for use in Russia, to meet the aluminium smelting needs of the parent company, and which would benefit Russia in the form of employment within Russia and increased tax revenue; (2) even if the Russian parties prevented the alumina being physically transferred to Russia, it would be transferred to China, which would improve the Russian parent company's security of supply and terms of trade of alumina, and its profitability, which would benefit Russia in the same way; and (3) it would indirectly make the Gladstone Plant available for the financial benefit of the Russian parent's direct and indirect shareholders, including Deripaska and Vekselberg - the contractual defences of Queensland Alumina and the Rio subsidiaries therefore succeeded - proceedings dismissed.

[Alumina and Bauxite Company Ltd](#) (I B C)

A-Civil Aust Pty Ltd v Ceerose Pty Ltd [2024] NSWCA 7

Court of Appeal of New South Wales

Leeming, White, & Mitchelmore JJA

Security of payments - Ceerose was partly successful in challenging the validity of an adjudication determination in favour of A-Civil under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (see Benchmark 14 April 2023 and Benchmark 24 April 2023) - the primary judge awarded Ceerose 60% of its costs (see Benchmark 23 August 2023) - A-Civil appealed - held: an adjudicator under the *Building and Construction Industry Security of Payment Act* is required to accord procedural fairness, even though the determination generally does not affect the parties' rights under the construction contract - only rarely will the Court quash an adjudication for want of procedural fairness because adjudicator reasoned in a way the loser could not have anticipated and as to which the loser was entitled to be heard - in this case, the reasons given by the adjudicator for determining that A-Civil was entitled to certain monies were so far removed from the submissions advanced by both parties that this was a rare case where there was a substantial breach of the obligation to accord procedural fairness - the question is whether the party has been given a fair opportunity to be heard, which will turn on an evaluative judgment of "what is in play" - the denial of procedural fairness here was material, in the sense that there was a realistic possibility that the decision could have been different but for the denial - the Court's decision should not mean that adjudicators will have to make decisions in terms closely reflecting the arguments of the parties, or submit their own views for further submissions, as this case turned on its particular facts, particularly that the adjudicator made a

decision on a basis that no one put and that was not properly anticipated - appeal dismissed.

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

CBX v QWJ [2024] QSC 5

Supreme Court of Queensland

Crowley J

Family law - former de facto partners owned property as tenants in common in equal shares - the plaintiff applied for the appointment of statutory trustees for sale under s38 of the *Property Law Act 1974* (Qld) - the defendant claimed the parties had been in an on-again off-again de facto relationship since 2014, and that her interest in the property should be recognised as more than half because she had greater financial need and had made greater financial and other contributions to its acquisition and maintenance - she applied for transfer to the Federal Circuit and Family Court under s5 of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Qld), so that she could pursue an application in that Court to adjust the parties' interests in the property - the plaintiff said the relationship had not been long enough to give the Federal Circuit and Family Court jurisdiction - held: the Supreme Court had no power to adjust the parties' interests in the property when appointing statutory trustees for sale - s90RC(2) of the *Family Law Act 1975* (Cth) provides that the de facto financial provisions in that Act apply to the exclusion of any State or Territory law regarding financial matters flowing from the breakdown of a de facto relationship - s90SB(a) of the *Family Law Act* provides that the Federal Circuit and Family Court may only alter property interests under s90SM if the period, or the total of the periods, of the de facto relationship was at least two years - the Court was satisfied the parties had been in a de facto relationship for about seven months in 2021 - however, the Court did not accept the defendant's evidence about the nature of the relationship between 2014 and 2021, and was not satisfied the parties had been in a de facto relationship for any of that time - transfer application refused - statutory trustees for sale appointed, with the net proceeds to be divided equally.

[CBX](#) (I B)

Tutt Bryant Group Limited v Piggott [2024] WASC 19

Supreme Court of Western Australia

Musikanth J

Consumer law - the plaintiff sought damages for the defendant being involved in a contravention of the *Australian Consumer Law* - the plaintiff alleged that the defendant was the General Manager of a builder who had made representations on behalf of that builder which induced the plaintiff to believe the builder was liable to perform remedial works on a property under the terms of a contract with a related company, that the builder would honour the related company's obligations under a structural guarantee in the contract, and that work done by the builder was fit for purpose or would be repaired within a reasonable time - the defendant sought summary judgment or alternatively that the statement of claim be struck out - held: as to summary judgment, the plaintiff alleged five alleged representations made at different times, but did not contend that any of the alleged representations led to a different causal consequence than any of the others - the Court did not find that the plaintiff's claim disclosed no reasonable cause of

action at all, but only with respect to two of the representations - it therefore could not be said that there is no real question to be tried - summary judgment refused - as to strike out, the object of pleadings is to ensure a fair trial by putting the other party on notice of the case to be met, and to define the issues for decision so that the Court can control the preparation of the case and the conduct of the trial - pleadings must therefore adequately disclose the party's case - the degree of precision required depends on the case - if a case of fraud is to be mounted, it should be pleaded specifically and with particularity, and this applies also to claims of misleading or deceptive conduct in breach of s18 of the *Australian Consumer Law* - regarding two of the alleged representations, on the plaintiff's own case, time would already have expired to commence proceedings against the builder's related company by the time those alleged representations were said to have been made - the paragraphs regarding these representations should be struck out - allegations in support of another representation were ambiguous or not reasonably intelligible, raised seemingly immaterial or irrelevant issues, and failed to state the case of the plaintiff with reasonable particularity, and should also be struck out - strike out application allowed in part.

[Tutt Bryant Group Limited](#) (I B C)

Piscioneri v Whitehouse [2024] TASSC 2

Supreme Court of Tasmania

Blow CJ

Legal profession - a deceased executed a will in 2019 that had been drafted by a partner in a law firm - a daughter of the deceased brought proceedings, alleging lack of testamentary capacity, undue influence, and breach of an agreement for mutual wills between the testator and her late husband - the defendants were the named executors in the 2019 will, being the law firm partner and two other children of the deceased - the defendants counterclaimed, propounding the 2019 will - the plaintiff sought to restrain the law firm from representing the defendants - held: the Court has power to restrain lawyers from acting - the test is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires a lawyer be prevented from acting, in the interests of protecting the integrity of the judicial process and the due administration of justice, including the appearance of justice - the power is exceptional and to be exercised with caution - due weight should be given to the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause - the timing may be relevant, in that the cost, inconvenience, or impracticality of requiring lawyers to cease to act may justify refusing to grant relief - r32 of the *Legal Profession (Solicitors' Conduct) Rules 2020* (Tas) provides that, where it is known or becomes apparent that a solicitor will be required to give evidence material to contested issues, the solicitor (or an associate of the solicitor or the solicitor's law practice) may not appear as advocate - it was inevitable that the partner would be a witness at trial, but he had now retired, was no longer a partner in the law firm, no longer does any work for the firm, and there was no suggestion he might appear as counsel at the trial - the law firm had not conducted the litigation with an ideal degree of efficiency, and had delayed in giving proper discovery - although there were grounds for criticism of the partner and the law firm, the



evidence did not warrant a conclusion that a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice required the firm be prevented from acting - application dismissed.

[Piscioneri \(I B\)](#)



Poem for Friday

The Flaming Heart

By: Richard Crashaw (c.1613-1649)

O heart, the equal poise of love's both parts,
Big alike with wounds and darts,
Live in these conquering leaves; live all the same,
And walk through all tongues one triumphant flame;
Live here, great heart, and love and die and kill,
And bleed and wound, and yield and conquer still.
Let this immortal life, where'er it comes,
Walk in a crowd of loves and martyrdoms;
Let mystic deaths wait on 't, and wise souls be
The love-slain witnesses of this life of thee.
O sweet incendiary! show here thy art,
Upon this carcass of a hard cold heart,
Let all thy scatter'd shafts of light, that play
Among the leaves of thy large books of day,
Combin'd against this breast, at once break in
And take away from me my self and sin;
This gracious robbery shall thy bounty be,
And my best fortunes such fair spoils of me.
O thou undaunted daughter of desires!
By all thy dow'r of lights and fires,
By all the eagle in thee, all the dove,
By all thy lives and deaths of love,
By thy large draughts of intellectual day,
And by thy thirsts of love more large than they,
By all thy brim-fill'd bowls of fierce desire,
By thy last morning's draught of liquid fire,
By the full kingdom of that final kiss
That seiz'd thy parting soul and seal'd thee his,
By all the heav'ns thou hast in him,
Fair sister of the seraphim!
By all of him we have in thee,
Leave nothing of my self in me:
Let me so read thy life that I
Unto all life of mine may die.

Richard Crashaw's exact date of birth is unknown; however, it is believed that he was

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born in late 1612 or early 1613 in London. Crashaw taught English poetry and was predominantly known in the 17th-century as a major metaphysical poet. In 1643 he fled first to France and then the Papal States as a refugee, as the Puritan General Oliver Cromwell gained control over England. He worked as Cardinal Giovanni Battista Maria Pallotta's attendant in Rome, converting from Anglicanism to Roman Catholicism. In April 1649, Richard Crashaw was canonized by Cardinal Pallotta at the Holy House Shrine in Loreto, where he passed away unexpectedly four months later.

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