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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)

MSA 4x4 Accessories Pty Ltd v Clearview Towing Mirrors Pty Ltd (No 2) (FCA) - a cross-claim for invalidity of a patent was so bound up with the original claim for infringement of the patent that the Court should depart from the usual rule that infringement and invalidity claims should be treated separately for costs purposes (I B)

Nasseri v Wellington Builders Pty Ltd & Ors (VSC) - corporate trustee of unit trust controlled by the owner of land was, on a building contract's proper construction, a party to that contract, and was therefore liable under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (I B C)

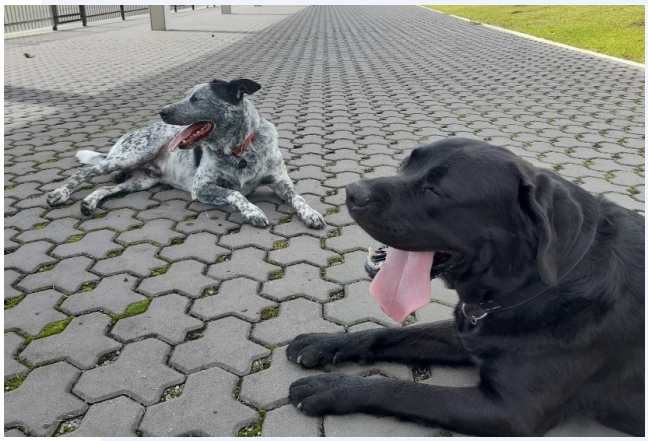
Carter & Anor v Mackey Motels Pty Ltd (QCA) - tenant running a motel business had not been entitled to withhold payment of insurance premiums, and landlord's claim to recover the premiums it had paid succeeded (I B)

Martin v Martin (WASC) - deceased had had testamentary capacity to execute a new will (B I)

Munupi Wilderness Lodge Pty Ltd v Executive Director of Township Leasing (NTSC) - Local Court had not erred in ordering a tenant holding over under an expired lease granted an Aboriginal Land Trust to vacate (I B)

HABEAS CANEM

Panting pooches



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Summaries With Link (Five Minute Read)

MSA 4x4 Accessories Pty Ltd v Clearview Towing Mirrors Pty Ltd (No 2) [2024] FCA 417
Federal Court of Australia
Downes J
Costs in patents cases - the applicants sued for infringement of a patent for storing or holding items in vehicles typically used by off-road enthusiasts and tradespersons - the respondent denied infringement, and claimed the patent was invalid, unjustified threats, and misleading or deceptive conduct - the Court had held that, on the proper construction of the patent, it was valid, as it did not lack novelty or an inventive step, and the relevant claim was fairly based on the matter described in the specification, given the Court's construction, and, further, the applicants had not discharged their onus of showing their threats of legal proceedings were justified, and the applicants making an announcement to customers and prospective customers that they had commenced the proceedings had contravened s18 of the *Australian Consumer Law* by engaging in misleading or deceptive conduct in trade or commerce (see Benchmark 30 January 2024) - the Court now determined costs - held: claims for patent infringement and invalidity are typically treated as separate events upon which the ordinary rule that costs follows the event applies - however, this is not an immutable principle - departure from the ordinary rule can be justified where there is a common substratum of fact, or the issues are wrapped up with one another or could not be readily disentangled - in this case, the cross-claim for invalidity was responsive to the infringement claim, and was therefore defensive - the claims the respondent had sought to invalidate were only those the applicants relied on for infringement - had the applicants' proposed construction been accepted, the respondent's invalidity claim would have succeeded on the ground of lack of fair basis - two of the three prior art documents relied upon by the respondent with respect to its novelty case were only advanced upon the constructions relied upon by the applicants in prosecuting their infringement claim - the preponderance of the expert evidence dealt with questions that related to both the infringement and invalidity claims, including construction - the outcome of the case is by far the most important factor which courts have viewed as guiding the exercise of the costs discretion - a global costs order covering both the infringement and invalidity claims was is the just and appropriate one - there should be a discount of 40% to take into account that the respondent advanced an obviousness case, which was not tethered to any construction issues, which broadened the scope of the controversy and which failed - applicants to pay 60% of the respondent's costs.
MSA 4x4 Accessories Pty Ltd (I B)

Nasseri v Wellington Builders Pty Ltd & Ors [2024] VSC 200
Supreme Court of Victoria
Garde J
Building and construction contracts - the plaintiff signed a MOU and then a development management agreement with a property developer - the parties in due course fell into dispute - the builder made a payment claim under the *Building and Construction Industry Security of Payment Act 2002* (Vic) in the amount of about $150,000 for completing the base stage of the

project - the plaintiff did not provide a payment schedule - an adjudicator found that the works were at base stage when the payment claim was made, and determined that about $160,000 was payable to the builder with an applicable rate of interest of 10% per annum - the plaintiff sought judicial review of the adjudicator's determination - held: identification of the parties to a contract must be in accordance with the objective theory of contract - when consideration was given to the text of the contract, the surrounding circumstances known to the parties, and the purpose and object of the parties, it was plain that the parties intended that the corporate trustee of a unit trust associated with the plaintiff to be a party to the contract - the handwritten changes to the contract and appendix to the contract made it clear that the parties intended that the unit trust have an important role under the contract and be subject to the rights and liabilities set out in its provisions - the plaintiff signed the contract because she was the landowner and this was entirely consistent with the parties' intention that the corporate trustee be a party to the contract - the post-contractual conduct of the parties overwhelmingly and compellingly pointed to the same conclusion - the contract was not void *ab initio* under s31(2) of the *Domestic Building Contracts Act 1995* (Vic) for want of signature by the building owner or authorised agent, as the plaintiff should be taken to have signed both in her own right as owner, and as authorised agent of the corporate trustee - the adjudicator had plainly correct when he treated the plaintiff and the corporate trustee as the respondents to the adjudication application - the adjudicator also had not erred in concluding that the plaintiff was 'in the business of building residences' within the meaning of s7(2)(b) of the *Building and Construction Industry Security of Payment Act* - where jurisdiction depends on a matter of fact, the Court determines the question of fact for itself on the evidence placed before it, the burden of establishing the facts which show an absence of jurisdiction always rests of the party applying for relief, and the standard of proof is high, requiring clear proof leading unmistakably to the conclusion that there was an excess of jurisdiction - the plaintiff and the builder were a commercial syndicate working together to achieve a profit-making objective, and both were in the business of building residences - the plaintiff's profit making intention could be ascribed also to the corporate trustee of the unit trust which was under her control - proceedings dismissed.
Nasseri (I B C)

Carter & Anor v Mackey Motels Pty Ltd [2024] QCA 68
Court of Appeal of Queensland
Morrison & Dalton JJA, & Applegarth J
Leases - the Carters were lessees of a motel in Bundaberg from 2002 - Mackey Motels became the registered owner of the motel in 2007 - there were disputes about whether insurance premiums were outgoings under the lease, and Mackey Motel's obligation to maintain and repair, from 2011 - Mackey Motels served a notice to remedy the failure to pay outgoings - the Carters did not comply with the notice, and then also did not pay rent shortly before commencing proceedings in 2016 - Mackey purported to re-enter, and the Carters gave up possession - Mackey Motels sought payment of the outstanding rent - a judge of the Supreme Court gave Mackey Motels summary judgment for the two months of outstanding rent, based on the terms of the lease that required payment without set-off or counterclaim and free and clear

of any withholding or deduction - the Court also held that the Carters' claim for recovery of insurance premium outgoings failed, and a counterclaim by Mackey Motels for unpaid insurance premium outgoings succeeded - the Carters appealed - held: the appellants had not proved that, upon the proper interpretation of the relevant clause in the lease, the insurance required by the landlord (Mackey Motels) in 2011 and later years was "substantially different" to the insurance held by the previous landlord immediately prior to the commencement of the lease - insurance taken out by an owner to protect its interests may also protect the tenant's interests and incline the tenant to not take out its own cover and create a double insurance problem - a tenant under a long lease, like the owner, has an interest in the leased premises - both policies here were in the name of the "owner", and a change in the identity of the owner did not make the policies substantially different - the fact that the earlier land operated the motel directly made it practically impossible to determine the extent to which the earlier protected a hypothetical tenant before commencement of the lease, and to compare the cover it provided with the cover and the later policy obtained by Mackey Motels - the Carters were not entitled to recover any part of the outgoings that they had paid after 2011 and they had no defence to Mackey Motels' counterclaim for premiums it incurred - the primary judge correctly held that the failure to make and advance insurance claims so as to rectify damage sustained in 2011 and 2013 was not pleaded as a breach of the lease or any other obligation; and considered the defects and damages claims in the Carter's case for alleged breach of the landlord's obligations - the motel's old and tired appearance and the absence of upgrades prior to the termination of the lease explained the decline in its financial fortunes between 2010 and 2016, and the Carters' reliance on this as part of their case was misconceived because, apart from any specific obligation, there was no duty to undertake upgrades - the Carters' global claim for lost profits therefore failed on the issue of causation - appeal dismissed.
Carter & Anor (I B)

Martin v Martin [2024] WASC 149
Supreme Court of Western Australia
Howard J
Probate - a deceased died at 93 years old who had married only once, and her husband had pre-deceased her in 2006 - she had no children and had not entered into a de-facto relationship - the deceased and her husband had made mirror wills in 1998, with the survivor leaving his or her estate in eleven equal shares to the deceased's brother and his wife and their five children, and the deceased's husband's brother's wife and her three children - the deceased's solicitor and one of the children on the husband's side sought to prove a 2019 will, as executors named in that will - three of the children on the deceased's side were defendants, and contended that the deceased had not had capacity to make the 2018 will, and sought to prove the 1998 will - held: the two doctors who gave medical evidence had not examined the deceased, and had worked from medical notes they had been provided - they both considered that the deceased had some cognitive impairment and some dementia, and that the deceased's judgement was most likely impaired at the time of making the 2019 will, but that there was no information to determine accurately the deceased's testamentary capacity - the Court had to be satisfied that

the deceased had had capacity to make the 2019 will, and that that will was properly executed, and the plaintiffs then, in the absence of evidence to the contrary, could take advantage of the presumptions that the deceased was competent and knew and approved of the contents of the will - to have testamentary capacity, the testator had to satisfy the test from *Banks v Goodfellow*¸ in that she understood the nature of the act and its effects, understood the extent of the property of which she was disposing, was able to comprehend and appreciate the claims to which he ought to give effect and, with a view to the latter object, that no disorder of the mind poisoned her affections, perverted her sense of right, or prevented the exercise of her natural faculties - on the evidence of the solicitor and others who had dealt with the deceased during the preparation of the 2019 will, the Court was comfortably satisfied she had had testamentary capacity when she executed the will, that that will had been the product of her instructions, and that it was duly executed - probate in solemn form granted in respect of the 2019 will.
Martin (B I)

Munupi Wilderness Lodge Pty Ltd v Executive Director of Township Leasing [2024] NTSC 36
Supreme Court of the Northern Territory
Brownhill J
Equitable leases - Munupi operated a fishing lodge as a tourism business from land on Melville Island - from 2005, Munupi occupied the land pursuant to a lease granted by the Tiwi Aboriginal Land Trust, which was an Aboriginal Land Trust that held the fee simple title to Melville Island pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) - from 2010, Munupi occupied the Land pursuant to rights and interests arising in equity in the form of an equitable lease on the same terms as the original lease, including provision for a five year term with an option to renew - the equitable lease expired in 2015, and Munupi did not exercise the option to renew - Munupi then occupied the land under a holding over clause in the equitable lease as a quarterly tenant - Munupi did not pay rent from 2016, and the parties were unable to negotiate a new lease - in 2017, the Trust granted EDTL a lease over the township of Pirlangimpi which included Munupi's land - this lease was under s19 of the *Aboriginal Land Rights (Northern Territory) Act*, which preserved rights existing before commencement of the lease - EDTL issued Munupi with a notice to quit - the Local Court ordered Munupi to vacate the premises - Munupi appealed on questions of law - held: the grounds of appeal were not framed as questions of law, but at their heart were two questions of law: (1) is the EDTL the 'agent' of the Commonwealth within the meaning of s125 of the *Business Tenancies (Fair Dealings) Act 2003* (NT) such that written authority, outside of s20C of the *Aboriginal Land Rights (Northern Territory) Act*, was required from the Commonwealth for the EDTL to issue the notice to quit? and (2) was there no evidence on which to find that the requirements for consultation in cl23 of the township lease had been met in relation to the EDTL's issuance of the notice to quit? - the provisions of Part 13 of the *Business Tenancies (Fair Dealings) Act* applied to the interests of Munupi under the holding over provision in the equitable lease - the fact that estates or interests granted by Land Trusts which exceed 40 years require the Commonwealth Minister's consent does not mean that, as a consequence, the Land Trust, which owns the fee simple, is acting as

the Commonwealth's agent in respect of the estate or interest granted - the ordinary meaning of the word 'administer', read in its statutory context, clearly extends to the determination of a quarterly tenancy created under the holding over clause in the equitable lease - even if Munupi could establish that there was no evidence that the EDTL consulted with a Consultative Forum regarding issuing the notice to quit, the Local Court's conclusion that the requirements for consultation under the township lease were satisfied sas not an error of law which vitiated the decision - appeal dismissed.
Munupi Wilderness Lodge Pty Ltd (I B)

Poem for Friday

Song of Hope

By: Thomas Hardy (1840-1928)

O sweet To-morrow! –
After to-day
There will away
This sense of sorrow.
Then let us borrow
Hope, for a gleaming
Soon will be streaming,
Dimmed by no gray –
No gray!

While the winds wing us
Sighs from The Gone,
Nearer to dawn
Minute-beats bring us;
When there will sing us
Larks of a glory
Waiting our story
Further anon –
Anon!

Thomas Hardy, (2 June 1840 - 11 January 1928), author and poet, was born in Dorset, England. His father was a stonemason, and his mother who was well read, educated Thomas to the age of 8, at which time Thomas commenced as a student at Mr Last's Academy for Young Gentlemen. On leaving school at the age of 16, due to his family's lack of finances to fund a university education, Thomas became an apprentice architect. Much of his work involved the restoration of churches. In 1862 he enrolled at King's College, London. He is best known for his novels, including *Far from the Madding Crowd,* (1874) and *Tess of the d'Urbervilles,* (1891). He was appointed a Member of the Order of Merit in 1910 and was nominated for the Nobel Prize in Literature in that year. He received a total of 25 nominations for the Novel Prize for literature during his life. Thomas Hardy died of pleurisy on 11 January 1928. He had wanted his body to be buried with his first wife Emma's remains at Stinsford. She had died in 1912 and much of his poetry was inspired by his feelings of grief following her death. His Executor Sir Sydney Carlyle Cockerell compromised by having Thomas Hardy's heart buried with the remains of his first wife Emma, and his ashes interred at Poets' Corner, Westminster Abbey. At the time of his death his estate was worth 95,418 pounds, the equivalent of over 6 million pounds

today. One of the largest literary societies in the world is the Thomas Hardy Society, based on Dorchester, https://www.hardysociety.org/.

Song of Hope by Thomas Hardy, read by Dylan Pearse, Music by Irish Folk Group, Kern
https://www.youtube.com/watch?v=Q1qo8sWTi6M

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