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Friday, 5 April 2024

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)

MMD Australia Pty Ltd v Camco Engineering Pty Ltd (FCAFC) - primary judge had been correct to reject trade mark infringement claims for a tooth construction for a mineral breaker (B I)

Perpetual Trustee Company Ltd v Attorney General of New South Wales (NSWSC) - Court ordered a cy pres scheme, in which farming enterprises of two related charitable trusts would be brought under single trust (I B C)

Coulter v Bush; Coulter v Domain Residential Northern Beaches Pty Ltd (NSWSC) - tenants succeeded against real estate agent retained by landlord to sell the house, where the agent had negligently caused the house to burn down (I B C)

Re Estate of Ahmed Abou-Khalid (NSWSC) - Court construed a direction in a will to make Zakat payments in accordance with Sharia law (I B)

Lapetina v Elgee Park Pty Ltd (VSCA) - primary judge had not erred in assessing damages for psychiatric injury arising from the applicant's employment with the respondent (I B)

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Summaries With Link (Five Minute Read)

MMD Australia Pty Ltd v Camco Engineering Pty Ltd [2024] FCAFC 38
Full Court of the Federal Court of Australia
Yates, Burley, & Jackman JJ
Patents - MMD owned a patent for "A tooth construction for a mineral breaker" - MMD contended that Camco had infringed nine claims of the patent by the unauthorised supply of five tooth constructions for mineral sizers to particular mine sites in Western Australia, and had also contravened s18 of the *Australian Consumer Law* - Camco denied infringement, and cross-claimed for revocation of the relevant claims of the patent - the primary judge dismissed the claims of patent infringement and contravention of s18 and held that the relevant claims of the patent were all valid (see Benchmark 16 August 2023) - MMD appealed and Camco cross-appealed - held: the primary judge was correct in construing the expression "seated in face to face contact" as meaning physically touching across most of the faces of the cover and the support body - if a claim is clear it is not to be made obscure simply because obscurities can be found in particular sentences in other parts of the document - the detailed method of construction described in the Specification for both the first embodiment and the second embodiment reinforced the plain meaning of the expression in Claim 1 - the primary judge was correct in concluding, by reference to Claims 7 and 8, that the front cover of Claim 1 must be the front wall of the intermediate cover in the case where there is both an intermediate and a top cover - given the construction of those integers, the issues of infringement did not arise - similarly, MMD's claim for contravention of s18, which was directed to an alleged representation by Camco that Camco and its customers were lawfully entitled without the consent of MMD to exploit Camco's products in Australia and failed to warn customers of infringement of the patent, did not arise - there was need to deal with the grounds set out in Camco's notice of contention and cross-appeal - appeal and cross-appeal dismissed.
MMD Australia Pty Ltd (B I)

Perpetual Trustee Company Ltd v Attorney General of New South Wales [2024] NSWSC 257
Supreme Court of New South Wales
Hmelnitsky J
Charitable trusts - the first plaintiff is the trustee of a charitable and the first, second and third plaintiffs are joint trustees of a related charitable trust - the trusts provided for two properties to be farmed and the income to be paid to the University of Sydney for research purposes - the plaintiffs sought orders pursuant to s9 of the *Charitable Trusts Act 1933* (NSW) for the approval of a cy pres scheme in relation to both trusts, where both farming enterprises would be brought within a single trust - held: the evidence demonstrated administrative and practical difficulties associated with the fact that the business is being conducted by the two trusts - the fact that the lands were held by trustees of two separate trusts was not an impediment to the lands being farmed in partnership as a single enterprise, but what mattered was the manifest inconvenience of having to account for the activities of the partnership via two separate charitable trusts, each

with its own administrative and accounting burden, in circumstances where the technical legal differences between the two trusts seemed to serve no meaningful practical purpose - s9 is engaged through three interacting criteria through which to consider the continuing utility of the original trust purposes: (1) wholly or in part; (2) suitable and effective method; and (3) with regard to the spirit of the trust - the test is whether the original purposes of the trust have ceased to provide a suitable and effective method of using the property, in whole or in part, having regard to the "spirit of the trust" - the spirit of the trust is a broader conception than the original purposes of the trust - the general law requirement of impossibility or impracticability of achievement of the trust purposes is no longer a condition precedent for a cy pres order - all parties were in favour of a scheme which allowed the assets of both trusts to be held subject to a single trust and to be applied cy pres for new purposes, but there was some division between the plaintiffs, on the one hand, and the University, on the other, as to how to achieve that outcome - it was appropriate that the present difficulties be addressed by way of cy pres scheme - plaintiffs to bring in a revised form of scheme taking the comments the Court had made into account.
View Decision (I B C)

Coulter v Bush; Coulter v Domain Residential Northern Beaches Pty Ltd [2024] NSWSC 267
Supreme Court of New South Wales
Hammerschlag CJ in Eq
Consumer law - Bush retained Doman Residential Northern Beaches to sell his double storey house at Avalon Beach - the house burned down while a real estate agent employed by Domain was the only person at the house, and in control of it, in order to supervise an open house - the house was leased to Coulter and Songaila pursuant to a Standard Form Residential Tenancy Agreement, who the agent had arranged to be away that day - the agent had, on her own initiative, taken laundry, hanging on a clothesline on the deck at the front of the house and put it in a downstairs room on the top surface of a clothing cabinet about 20-30cm beneath a light fitting, and turned the light on, and had placed a wicker basket containing various items including, apparently, a candle in the room also - the tenants sued Domain in negligence for the value of their personal property destroyed in the fire - the tenants also sued Bush in contract for alleged failure to give quiet enjoyment, but abandoned this claim - Bush cross-claimed for the cost of restoration of the house against Domain in negligence and under the *Australian Consumer Law*, which implied into the agency agreement between Bush and Domain a guarantee that Domain would render its services with due care and skill - held: on the balance of probabilities, the agent had caused the fire - the agent had actively created the risk of fire and the consequent harm, and, having created the risk, took no precautions against it - that a fire might be caused by putting or throwing bedding up against a burning light was obvious, and plainly foreseeable, and the agent ought to have known this - a reasonable person would not have created that risk of harm, but if they did, would have taken precautions against that harm eventuating - the reference in s5B(2)(d) of the *Civil Liability Act 2002* (NSW) to social utility of the activity that creates the risk of harm does not have in mind a privately retained real estate

agent making a privately owned house tidy or presentable for sale, and there is no social element in such activity - the agent's negligence had caused the harm in this case - none of the plaintiffs or Bush could have possibly or remotely conceived that the agent might do what she did - it was not suggested that presenting the house for the open house was not part of the services to be rendered by Domain - judgment for the plaintiffs in agreed amounts.
View Decision (I B C)

Re Estate of Ahmed Abou-Khalid [2024] NSWSC 253
Supreme Court of New South Wales
Lindsay J
Succession - the administrator of a deceased estate sought the guidance of the Court (in an *ex parte* application but on notice to the beneficiaries) about the proper construction and management of an unarticulated testamentary direction to pay "Zakat payments" - Zakat is a distinctly Islamic form of charitable donation under Sharia law - the administrator relied on the jurisdiction of the Court under r54.3 of the *Uniform Civil Procedure Rules 2005* (NSW) to make orders for the partial administration of an estate and the jurisdiction under s63 of the *Trustee Act 1925* (NSW) to provide judicial advice - held: the Court was obliged to consider the nature of "Sharia law" and "Zakat" under Australian law because of the language of the deceased's will; extrinsic evidence that confirmed an intention, implicit in the will, to give effect to his understanding of Sharia law; and a submission of the administrator that the testamentary provision authorising and directing the deceased's legal personal representative to pay Zakat payments was void for uncertainty - it may be unwise for solicitors and testators to label a will as a "Sharia (compliant) will" because to do so may invite disputes about the extent to which, if at all, contested views about the nature and content of "Sharia law" should be taken into account in the administration of a deceased estate - under the general law a religious body is a voluntary association, with mutual relations and obligations of the members regulated by an agreement or "consensual compact" to which they are parties - it was no part of the Court's function to lay down rules about what is, or may be, a "Sharia (compliant) will" - however, in administration of the law of succession the Court endeavours to respect an individual's religious beliefs and may take them into account when assessing the validity, if not also the proper construction, of a will - in the Court's view, the expression "Zakat payments" in the will referred to a conscientious commitment entered into by the deceased during his lifetime, enforceable at law or in equity, against his deceased estate, for a payment of money or a payment in kind of a type recognised in his community as a Zakat purpose not proscribed by Australian law - the direction had work to do if construed as an implicit acknowledgement at the time of execution of the will that, at the time of death, the deceased may have bound himself and his estate, at law or in equity, to pay a debt (enforceable under the general law) in the nature of a Zakat payment - the direction was not void for uncertainty - there was nothing in the will that rendered entitlements of the deceased's children conditional on a payment of Zakat - the Court proposed to direct the administrator that she would be justified n distributing the estate of the deceased on the basis that no allowance is to be made for a payment of, or in the nature of, Zakat.
View Decision (I B)

Lapetina v Elgee Park Pty Ltd [2024] VSCA 39
Court of Appeal of Victoria
Beach & Niall JJA, & J Forrest AJA
Accident compensation - the applicant obtained an award of damages in the County Court for psychiatric injury arising from her employment with the respondent - the primary judge assessed damages in the sum of about $300,000, comprising components for pain and suffering, past loss of earnings, and superannuation losses - this amount was subsequently reduced having regard to the receipt by the applicant of weekly payments of compensation under the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) and judgment in the sum of $150,000 was entered - the applicant sought leave to appeal - held: the assessment of damages necessarily involves consideration of a hypothetical: what would the applicant's capacity have been and how would it have been deployed had the applicant not been injured - the applicant was entitled to damages reflecting the loss of earning capacity both before the trial and after it - although it is conventional to separate past and future economic loss, they are both aspects of the same head of damage - where an assessment of the effect of an injury requires an assessment of future or hypothetical events, exact proof is necessarily unattainable, and so the Court must assess the degree of probability that an event would have occurred or might occur and adjust its award of damages accordingly - an allowance may be made for contingencies or vicissitudes - the primary judge had not erred in assessing such damages - a judge is required to set out findings on material questions of fact, refer to the relevant evidence and provide an intelligible explanation of the process of reasoning that led the judge from evidence to conclusion - the primary judge's reasons were extensive and detailed - the judge provided a reasoned explanation for his conclusion that the applicant was likely not to have worked beyond a certain date - the primary judge's reasons had been sufficient - there was no reason to conclude that the judge impermissibly directed himself by reference to comparable cases - no basis for the Court to intervene had been established in respect of the amount of the general damages.
Lapetina (I B)

Poem for Friday

Do not go gentle into that good night

By: Dylan Marlais Thomas (1914-1953)

Do not go gentle into that good night,
Old age should burn and rave at close of day;
Rage, rage against the dying of the light.

Though wise men at their end know dark is right,
Because their words had forked no lightning they
Do not go gentle into that good night.

Good men, the last wave by, crying how bright
Their frail deeds might have danced in a green bay,
Rage, rage against the dying of the light.

Wild men who caught and sang the sun in flight,
And learn, too late, they grieved it on its way,
Do not go gentle into that good night.

Grave men, near death, who see with blinding sight
Blind eyes could blaze like meteors and be gay,
Rage, rage against the dying of the light.

And you, my father, there on the sad height,
Curse, bless, me now with your fierce tears, I pray.
Do not go gentle into that good night.
Rage, rage against the dying of the light.

Dylan Marlaise Thomas, a Welsh poet and writer, was born in Swansea, Wales, on 27 October 1914. He had published poetry by the time he was in his teens. It is said of him that he was "*obsessed with words—with their sound and rhythm and especially with their possibilities for multiple meanings*". He was an alcoholic and destitute at many times throughout his life and known for his erratic behaviour, particularly in his later years. His well-known works included *And death shall have no dominion* and *Under Milk Wood*, *a play for voices.* Dylan Thomas travelled to the USA in the 1950s, giving readings of his work. He is acknowledged as one of the great poets of the 20th century and as one of the most important Welsh poets. He died on 9 November 1953 in New York. Many of Dylan Thomas' works moved into the public domain on 1 January 2024. His work has inspired films, musical adaptions, and opera. The words and themes from the poem *Do not go*

gentle into that good night were used in the films Independence Day in 1996 and Interstellar in 2014.

Dylan Thomas reads Do Not Go Gentle into That Good Night"
https://www.youtube.com/watch?v=1mRec3VbH3w

Michael Sheen, National Theatre, performs "Do not go gentle into that good night"
https://www.youtube.com/watch?v=w-sM-t1KI_Y

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