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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)

Cassaniti v Ball as liquidator of RCG CBD Pty Limited (in liq) and related matters; Khalil v Ball as liquidator of Diamondwish Pty Ltd (in liq) and related matters (NSWCA) - findings of liability against directors and other persons knowingly involved in a "carousel fraud" upheld (I B)

Croc's Franchising Pty Ltd v Alamdo Holdings Pty Limited (NSWCA) - stay of judgment pending appeal granted, subject to the appellants providing security over the homes in their wives' names for a certain amount (I B)

Leppington Pastoral Co Pty Ltd v Chief Commissioner of State Revenue (NSWSC) - duties assessment revoked on the basis that a development agreement had not effected or evidenced that the land owner would hold the project land on trust for the developer (I B C)

State of Victoria v 5 Boroughs NY Pty Ltd (VSCA) - primary judge had been correct to refuse to stay a class action against the State of Victoria pending the resolution of occupational health and safety criminal charges against the State arising out of the same general facts (I B)

Kulowall Construction Pty Ltd v Chellem (WASC) - builder's contention that State Administrative Tribunal did not have jurisdiction to hear a building dispute and to order compensation under the *Building Services (Complaint Resolution and Administration) Act 2011* (WA) rejected (I C)

IOF Custodian Pty Limited atf the 105 Miller Street North Sydney Trust v North Sydney Council (NSWLEC) - development application involving the demotion of the MLC Building in North Sydney refused (B C I)

HABEAS CANEM

After Gardening

Summaries With Link (Five Minute Read)

Cassaniti v Ball as liquidator of RCG CBD Pty Limited (in liq) and related matters; Khalil v Ball as liquidator of Diamondwish Pty Ltd (in liq) and related matters [2022] NSWCA 161
Court of Appeal of New South Wales
Gleeson, Leeming, & Mitchelmore JJA
Directors duties and accessorial liability - the liquidator of a number of companies brought proceedings against certain directors and other persons, alleging a "carousel fraud", under which GST and income tax benefits were generated by circulating money through the companies, and then each company was voluntarily wound up when it was left unable to satisfy its only legitimate creditor, the Commissioner of Taxation - the directors were said to be liable under ss181 and 182 of the *Corporations Act 2001* (Cth), by failing to exercise their powers and discharge their duties in good faith in the best interests of the company and for a proper purpose, and by improperly using their positions to gain an advantage or to cause the company detriment - other persons were said to be liable under the second limb in *Barnes v Addy* (knowing participation in a breach of fiduciary duty) and for being knowingly involved in the directors' contraventions of the *Corporations Act* - the primary judge upheld some claims and dismissed others - some parties appealed - held: s95 the *Civil Procedure Act 2005* (NSW) impliedly abrogated the common law rule that release of one joint and several wrongdoer releases all other joint and several wrongdoers - the same result inhered in equity, as there was no reason for equity to follow an unjust and disfavoured rule at common law, particularly where liability in equity is conceptually different, is subject to discretionary defences, and is apt to be measured differently as between defendants - in respect of one appellant who had been found guilty of accessorial liability, it was sufficient that he had actual knowledge of the relevant director's breach, or had wilfully shut his eyes to the obvious, or had wilfully and recklessly failed to make such inquiries as an honest and reasonable person would make, or had knowledge of circumstances which would indicate the facts to an honest and reasonable person - the trial judge had correctly stated this test but had misapplied it - however, on a correct re-application of the test by the Court of Appeal, the facts as known to that appellant would have indicated to an honest and reasonable person that the invoices he was creating were contrived and that the payments and cash withdrawals he was making lacked any genuine commercial purpose - the finding of accessorial liability against that appellant should be upheld - appeals dismissed.
View Decision (I B)

Croc's Franchising Pty Ltd v Alamdo Holdings Pty Limited [2023] NSWCA 85
Court of Appeal of New South Wales
Brereton JA
Stay pending appeal - a lessor sued a lessee and the lessee's directors in the Supreme Court - the Supreme Court gave judgment in favour of the lessor for just over $1million, holding that the Covid special provisions in Sch5 to the *Conveyancing (General) Regulation 2018* (NSW) did not preclude the lessor from re-entering and recovering rental arrears, and that guarantees given by directors of the lessee were effective - the Supreme Court also dismissed a cross-claim by the

lessee for wrongful termination of the lease - the lessee and the directors appealed - they then applied for a stay of execution of the judgment pending appeal - held: the relevant considerations, at least in the circumstances of this case, included the arguability of the grounds of appeal, whether in the absence of a stay the right of appeal would be rendered nugatory, and the balance of prejudice between the parties - the lessor had a *prima facie* right to the fruits of its judgment and therefore the onus was on the appellants to make out a case for a stay - the grounds of appeal were not unarguable, which was not to say they were strong - the appeal would be rendered nugatory in the absence of a stay, as it was virtually investable the lessee would be wound up and the directors bankrupted - the prejudice to the appellants, if a stay were not granted, was straightforward and substantial, in that they would be deprived of a right to prosecute an arguable appeal which potentially could result in relief from substantial liability - the prejudice to the lessor if the stay were granted would likely be that it could not enforce its judgment for eight to ten months - the stay should be granted, subject to the directors paying into court the arrears portion of the judgment, or providing security over the homes in their wives' names for that amount.
View Decision (I B)

Leppington Pastoral Co Pty Ltd v Chief Commissioner of State Revenue [2023] NSWSC 463
Supreme Court of New South Wales
Williams J
Taxation and duties - in 2008, Leppington Pastoral Co, Greenfields Development Company, and Landcom entered into agreements for the development of agricultural land owned by Leppington - Leppington gave Greenfields the right to develop the project and options to acquire the project land in stages - in 2010, the parties entered into further agreements, including a Development Rights Agreement - in 2017, the Chief Commissioner issued a notice of assessment to Leppington for just under $27million, for duty, interest, and penalty tax - the Chief Commissioner considered the Development Rights Agreement effected or evidenced a declaration of trust within the meaning of s8(3) of the *Duties Act 1997* (NSW), pursuant to which Leppington held the project land on trust for Greenfields - Leppington filed an objection, and the Chief Commissioner upheld the objection to the extent of accepting a reduced valuation of the land and remitting penalty tax, leaving a revised assessment of over $14million - Leppington sought review of the revised assessment by the Supreme Court under s97(1)(a) of the *Taxation Administration Act 1996* (NSW) - held: the question whether an express trust exists must be answered by reference to intention - where there is no explicit declaration of an intention to create a trust, the court must determine whether such an intention is to be imputed from the language of the documents or oral dealings, having regard to the nature of the transactions and the relationship between the parties - thus, the ascertainment of the requisite intention depended on the construction of the transaction documents in accordance with the ordinary principles of contractual interpretation, and the parties' subjective intentions were not relevant - the clauses in the Development Rights Agreement that required Leppington to hold the land subject to Greenfields' development rights, and giving Greenfields the right to carry out the

project for its sole benefit, did not manifest an intention that Leppington would hold the land on trust for Greenfields - the "project" was not synonymous with the "project land", and the Development Rights Agreement and associated documents did not confer all benefits derived from the project land on Greenfields - Leppington was entitled to continue its existing farming, dairy, and grazing business on the project land for its own benefit and profit, unless and until Greenfields acquired parts of that land by exercising its options or issuing development notices that then entitled it to exclusive possession - the Development Rights Agreement had not effected or evidenced a trust, and the assessment must be revoked - parties to confer on form of orders to give effect to the Court's reasons for judgment.
View Decision (I B C)

State of Victoria v 5 Boroughs NY Pty Ltd [2023] VSCA 101
Court of Appeal of Victoria
Beach, T Forrest, & Hargrave JJA
Class actions - the plaintiff commenced a group proceeding against five defendants, including the State of Victoria, the former Minister for Health, the former Minister for Jobs, and the Secretaries of the Department of Health and the Department of Jobs - the plaintiff claimed, on its own behalf and on behalf of a group of Victorian businesses, damages for economic loss allegedly suffered as a result of the spread of Covid from two quarantine hotels - WorkCover later filed 58 criminal charges against the Crown in right of the State of Victoria (Department of Heath) alleging contraventions of ss21(1) and 23(1) of the *Occupational Health and Safety Act 2004* (Vic) arising out of the operation of the hotel quarantine program - Victoria sought that the class action be stayed pending resolution of the criminal proceedings - the primary judge dismissed this application - Victoria sought leave to appeal - held: as this was a proposed appeal from an interlocutory discretionary decision, the applicant had to demonstrate *House v The King* error, in that the primary judge acted upon a wrong principle, allowed extraneous or irrelevant matters to guide or affect him, mistook the facts, failed to take into account some material consideration, or made orders that were unreasonable or plainly unjust - far from being erroneous, the primary judge's refusal to grant the stay was plainly correct - there are interlocutory steps which can be taken in the class action proceeding which do not require Victoria to provide any material disclosing the course it might take in the criminal trial - there was no error in the order of the primary judge requiring the defendants to give specific discovery of documents already produced, or the order which contemplated the possible filing of an application for a group costs order - to avert the risk of prejudice to Victoria in its defence of the criminal charges, the primary judge had made orders for the filing of a proposed defence on confidential terms - the primary judge had accepted that, absent a clear statutory power to the contrary, a person charged with a crime cannot be compelled to assist in the discharge of the prosecution's onus of proof, but had concluded that the interests of justice did not require the proceedings be stayed - leave to appeal refused.
State of Victoria (I B)

Kulowall Construction Pty Ltd v Chellem [2023] WASC 140

Supreme Court of Western Australia
Tottle J
Building services complaints - a builder contracted with land owners for the construction of a double-story house - the contract was in the form of the WA HBCA Lump Sum Building Contract published by the Housing Industry Association - the builder told the owners that the cost of bricklaying had increased and that the builder would not start bricklaying until the owners contributed to the increased cost - the owners refused to pay - the owners lodged a complaint with the Building Commissioner, who referred the complaint to the State Administrative Tribunal under s11(1)(d) of the *Building Services (Complaint Resolution and Administration) Act 2011* (WA) - the Tribunal concluded the builder had not been entitled to increase the contract price and that there had not been any valid exercise of any right to do so under the contract - the Tribunal also found the owners were entitled to compensation of just under $10,000 for the cost of temporary fencing to secure the property - the builder applied for leave to appeal to the Supreme Court, challenging the Tribunal's jurisdiction rather than its findings - held: the builder's argument that the owners' complaint neither alleged a breach of the contract nor involved any complaint about any price increase had no merit - the owners had described their complaint on the complaint form as being that the builder "stopped building works due to high brick prices" - however, the *Building Services (Complaint Resolution and Administration) Act* imposed a scheme of consumer legislation, and attention should be given to substance, not form - it was plain beyond peradventure that the owners were complaining that the builder had stopped work and that this constituted a breach of the contract - the builder's argument that the Tribunal had no jurisdiction to make a compensation order because it had made no finding that there had been an unlawful suspension was also without merit - the Tribunal had clearly found the builder's suspension of work had been unlawful - application for leave to appeal dismissed.
Kulowall Construction Pty Ltd (I C)

IOF Custodian Pty Limited atf the 105 Miller Street North Sydney Trust v North Sydney Council [2023] NSWLEC 1207
Land and Environment Court of New South Wales
Dixon SC
Heritage - the MLC building was built in North Sydney in 1957 and has been listed in various local environmental planning instruments as a heritage item since 1989 - it is currently listed in Sch5 of the *North Sydney Local Environmental Plan 2013* as a heritage item of State significance - it was the first high rise office block in North Sydney and the largest for a number of years after its construction, and is a seminal building on subsequent high-rise design in Sydney using construction and structural techniques not previously used in Australia, including the first use of a curtain wall design and the first use of modular units in Australia - the applicant lodged a development application to demolish the building and construct a new building - Council made no decision - the applicant commenced a Class 1 appeal to the Land and Environment Court as the application was deemed to have been refused pursuant to ss8.7 and 8.11 of the *Environmental Planning and Assessment Act 1979* (NSW) - held: the appropriate starting point was to assess the heritage significance of the MLC building - complete demolition

of the MLC building would have significant and irreversible heritage impacts - the building continued to have structural integrity, albeit requiring urgent maintenance, repair, and updating - the applicant had not satisfactorily demonstrated why it was not reasonable to conserve the building - after consideration of the matters under s4.15 of the *Environmental Planning and Assessment Act*, including the public interest which embraces the principals of ecologically sustainable development and intergenerational equity, and mindful of the particular relationship between heritage conservation and intergenerational equity, the Court was of the view that the evidence weighed against the grant of consent - appeal dismissed.
View Decision (B C I)

Poem for Friday

*In memory of **Dr Brian McDonald**, who died on 6 April 2023, aged 71 years. Dr McDonald was a renowned molecular geneticist and DNA expert.*
He was a scientist of great courage, intelligence, insight and humour. We doubt that Dr McDonald would have suffered the same conflicts as Edgar Allan Poe expresses in Sonnet-To Science

Sonnet - To Science

By: Edgar Allan Poe (1809 - 1849)

Science! true daughter of Old Time thou art!
Who alterest all things with thy peering eyes.
Why preyest thou thus upon the poet's heart,
Vulture, whose wings are dull realities?
How should he love thee? or how deem thee wise,
Who wouldst not leave him in his wandering
To seek for treasure in the jewelled skies,
Albeit he soared with an undaunted wing?
Hast thou not dragged Diana from her car,
And driven the Hamadryad from the wood
To seek a shelter in some happier star?
Hast thou not torn the Naiad from her flood,
The Elfin from the green grass, and from me
The summer dream beneath the tamarind tree?

Edgar Allan Poe (19 January 1809 – 7 October 1849) was an American poet, literary critic and writer of short stories. He is said to have invented the genre of the detective story. He also wrote works in the genre of Gothic horror. His work was intended to appeal to the mass- market. He attended the University of Virginia. He had a career in the military and graduated from West Point. *Sonnet to Science* was published in 1829. After his death his reputation was tarnished by Rufus Girswold, a literary rival, who, became Poe's literary executor. Letters which Griswold relied on to destroy Poe's reputation were later found to be forgeries.

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