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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 Securities and Investments Commission v Darranda Pty Ltd (Liability) (FCA) - contracts for the hire of goods were credit contracts and not consumer leases (I B)

Fohec Pty Ltd v Kahila (NSWSC) - guarantor was liable under documents he had executed in front of his solicitor, but had not delivered to the lender or its agents (I B C)

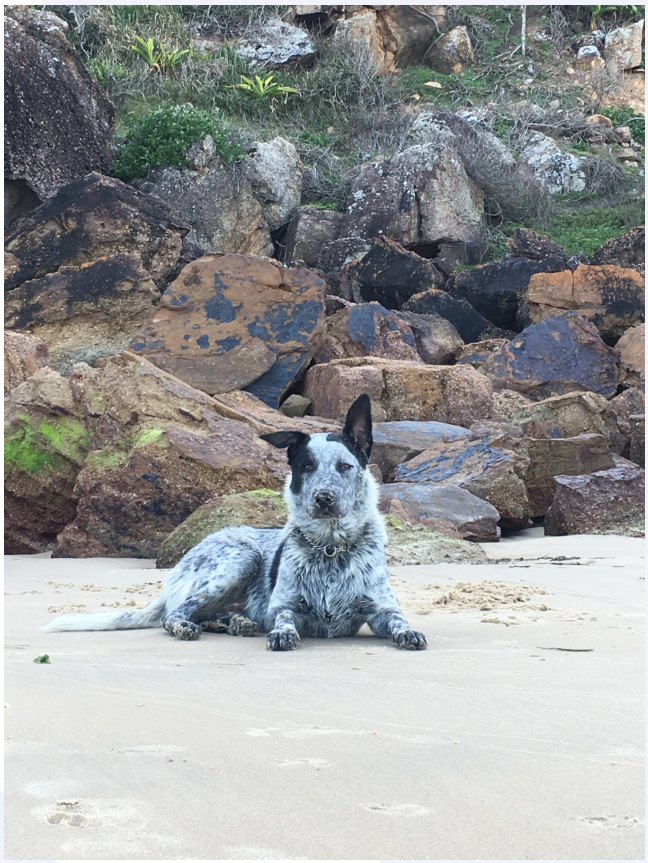
O'Brien v Supercheap Security Pty Ltd (NSWSC) - principle of company who had allowed a third party to operate a bank account in the name of the company was liable to the victims of a fraud perpetrated by that third party, under the second limb of *Barnes v Addy* (I B)

Kilah & Anor v Medibank Private Limited (No 2) (VSC) - soft class closure order made in class action, in respect of a time period as proposed by the plaintiffs (I B)

Mokbel v State of Victoria (VSC) - Court refused to strike out claim in negligence by a prisoner against the State of Victoria (I B)

HABEAS CANEM

Dog on the rocks



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Summaries With Link (Five Minute Read)

Australian Securities and Investments Commission v Darranda Pty Ltd (Liability) [2024] FCA 1015
Federal Court of Australia
Hespe J
Consumer law - Darranda operated a franchise business under the name "Rent4Keeps", which rented personal use and household items (such as appliances and furniture) to customers - Darranda and its customers entered into 516 contracts for the hire of goods over a period - ASIC contended that the contracts were credit contracts and therefore subject to an annual cost cap of 48% as well as certain disclosure requirements - Darranda contended that the contracts were consumer leases and therefore the cap and the disclosure requirements did not apply - held: whether the contracts were consumer leases depended on whether, under the contract, the hirer had a right or obligation to purchase the goods - the issue was whether the conditional agreement by Darranda to transfer ownership of the goods to a giftee nominated by the hirer constituted a right or obligation by the hirer to purchase the goods - a right or obligation to purchase does not require the hirer to be under an obligation to pay a separate or additional amount as a purchase price - because the contract conferred on the hirer a right to purchase the goods, the contract, properly construed, was not a consumer lease - the contract operated to automatically transfer ownership to the nominated giftee if the hirer complied with the hirer's obligations under the contract, and did not provide for the exercise of a discretion by Darranda, and there was no sham because Darranda intended for the contract to operate in accordance with the terms - the contracts were credit contracts, and Darranda was a credit provider party to those contracts, and can contravened a number of sections of the *National Credit Code* (Schedule 1 to the *National Consumer Credit Protection Act 2009* (Cth)) - a failure to comply with a requirement of the Code can itself demonstrate a failure to engage in credit activities efficiently, honestly and fairly - Darranda was in breach of its licence condition requiring it to have a "key person" - parties to be heard on form of declarations and what, if any, civil penalty should be imposed.
Australian Securities and Investments Commission (I B)

Fohec Pty Ltd v Kahila [2024] NSWSC 1120
Supreme Court of New South Wales
Kunc J
Contracts - George and David were brothers - George's company, Fohec, advanced $250,000 to David's company, RSA Civil, by way of a loan repayable in three months - David executed a suite of loan documents in the presence of his solicitor, including a mortgage and a guarantee of RSA Civil's obligations - the executed loan documents were never physically delivered on behalf of RSA Civil and David to Fohec or its agents - the parties disputed whether, in these circumstances, David was bound by the mortgage, and, if he were, what property was secured by the mortgage - there were two potential security properties: (1) a Pemulway proper that had been owned by David and his wife and which had been sold, with David's half of the proceeds

having been paid into Court; and (2) a Kellyville property that had been owned by David's wife, which had been sold, with the wife using the net proceeds of sale to purchase a new property in her own name - Fohec contended that half of the Kellyville property had been held on resulting trust for David, and so half of the new property was also held on trust - held: David became bound by the mortgage (including the guarantee) either at the time he signed it, or shortly after when he telephoned George and told George that he had signed the loan documents - Fohec was therefore entitled to judgment against David for the advance less an amount that had been repaid, and the balance of David's share of the proceeds of sale of the Pemulway property - Fohec's case against the wife failed - it was not necessary to determine whether any part of Kellyville was held on resulting trust for David - even if it were, Fohec has not pleaded or articulated any basis on which it would be entitled to a money judgment against the wife, including now that she has used the proceeds of sale of Kellyville to acquire a new property in her sole name - the wife had owed no trust, fiduciary, or other obligations to Fohec which would entitle it to relief against her in respect of the proceeds of sale of Kellyville.
View Decision (I B C)

O'Brien v Supercheap Security Pty Ltd [2024] NSWSC 1117
Supreme Court of New South Wales
Nixon J
Equity - the plaintiffs were deceived, by persons who claimed to represent "AMP", into depositing funds into a bank account which they believed had been set up in their own name, for the purpose of investing in a term deposit - the bank account was actually held by Supercheap Security, and the funds were transferred out of that account to third parties located overseas - Mehdi was its sole director and shareholder of Supercheap Security, but claimed he had handed over control of the company to a third party before the fraud occurred, and had had no knowledge of the fraud - the plaintiffs sued the bank, Supercheap Security, and Mehdi - the claim against the bank was dismissed and default judgment was granted against Supercheap Security - the Court now decided whether Mehdi was liable under the second limb in *Barnes v Addy* for the amounts paid into the account - held: there was no evidence of any agreement to transfer Supercheap Security, and the Court did not accept Mehdi's account that he agreed to hand over Supercheap Security to the third party - the bank account had been set up at the request of the third party - where money has been stolen or obtained by fraud, it is trust money in the hands of the thief, and the thief cannot divest it of that character - such a trust arises by operation of law from the time that the property is received, and thus is distinct from a remedial constructive trust which arises only upon the making of a court order - similarly, a volunteer who receives money obtained by fraud, with notice of the fraud, holds it on trust - from the time when the plaintiffs' money was deposited into the account, Supercheap Security held that money on trust for the plaintiffs; and, when Supercheap Security transferred those moneys out of the account to persons unknown, it did so in breach of trust - Mehdi assisted in the breach of trust by establishing the bank account for the third party' use, by increasing the credit limit on individual transactions, by handing over control of the account and providing login and password details - the question was whether he had done so with knowledge of a type and

extent sufficient to give rise to liability under the second limb of *Barnes v Addy* - the Court was not satisfied Mehdi had actual knowledge of the fraud - however, Mehdi was aware of various matters which would have indicated to an honest and reasonable person in his position that the third party intended to use the account for dishonest purposes - he had turned a blind eye to how the account was being used - this was sufficient for liability under the second limb of *Barnes v Addy* - the plaintiffs were entitled to equitable compensation from Mehdi for the amount deposited by each of them, together with interest.
View Decision (I B)

Kilah & Anor v Medibank Private Limited (No 2) [2024] VSC 519
Supreme Court of Victoria
Attiwill J
Class actions - the plaintiffs commenced a class action arising from a cyber data breach in the defendant's information technology network, which resulted in substantial volumes of data, including the personal health claims data of customers collected by the defendant, being accessed by one or more hackers and later released on the dark web - the plaintiffs alleged that the defendant failed to make disclosures to the market as to its cyber security and information technology controls and misled the market through public statements it made regarding its cyber security and information technology controls and its systems of risk oversight and management of its customers' personal and private information - the parties sought orders for soft class closure and there was a dispute about the period of time of the soft class closure - the plaintiffs sought it be a period expiring three months after the first day of mediation, and the defendant sought it continue until the day prior to the commencement of the initial trial - the plaintiffs also sought the production of notices issued by the Australian Information Commissioner in respect of the Commissioner's investigations into the incident - held: a soft class closure order is used to describe an order which requires group members to register as a precondition to an entitlement to share in a settlement reached at or following a mediation and prior to the commencement of the trial, being a settlement later approved by the Court - a soft class closure order was appropriate in this case, as it crystallised the number of participating group members, and by obtaining data regarding their claimed losses, would increase the likelihood of the parties engaging in a successful mediation - it was appropriate and necessary to ensure that justice is done in this proceeding to make an order for a soft class closure for the period proposed by the plaintiffs - the defendant's proposal would prejudice group members - it was more likely that the plaintiffs' proposal would facilitate a settlement at the mediation, as it may focus the attention of the parties on the desirability of settling the proceedings at that mediation - it was not appropriate or necessary, in order to facilitate that mediation, to exclude group members from being entitled to obtain any benefit pursuant to any settlement that may occur much later and possibly shortly prior to a trial in 18 to 24 months' time - as to the documents sought, the Court was not satisfied that the production of the documents would likely assist an efficacious discovery process.
Kilah & Anor (I B)

Mokbel v State of Victoria [2024] VSC 528
Supreme Court of Victoria
Irving AsJ
Negligence - the plaintiff was incarcerated, and sued the State of Victoria and the Secretary to the Victorian Department of Justice and Community Safety in negligence, arising from an incident in which he was attacked by other prisoners and the conditions of his imprisonment when he returned from hospital after the attack - the plaintiff also alleged the Secretary and other prison officials had acted unlawfully under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) - the defendants sought that the statement of claim be struck out on the grounds that it may prejudice, embarrass or delay the fair trial of the proceeding or that it fails to disclose a cause of action - held: the function of a pleading in civil proceedings is to alert the other party to the case they need to meet - a pleading must state all the material facts to establish a reasonable cause of action (or defence) - a pleading is 'embarrassing' when it places the opposite party in the position of not knowing what is alleged - it is not sufficient to simply plead a conclusion from unstated facts - particulars are not intended to fill gaps in a deficient pleading, but are rather intended to meet a separate requirement: to fill in the picture of the cause of action (or defence) with information sufficiently detailed to put the other party on guard as to the case that must be met - there is an inherent danger in a negligence action to look first to the cause of damage and what could have been done to prevent that damage, and from there determine the relevant duty, its scope and content - the duty owed by a gaoler to a prisoner is well recognised - t would be inconsistent with the overarching principle of the *Civil Procedure Act 2010* (Vic) to strike out the statement of claim because of gaps caused by the plaintiff's ignorance of matters within the defendants' knowledge and to require the plaintiff to seek preliminary discovery - the Court was satisfied that, when considered as a whole and at this stage of the proceeding, being before discovery, the plaintiff's pleading was not embarrassing such that it necessitated the pleading being struck out - it was to be expected that the plaintiff's case would be further defined and refined following the various interlocutory processes available to the parties - strike out application dismissed.
Mokbel (I B)

Poem for Friday

Sonnet 66

By William Shakespeare (1564-1616)

Tir'd with all these, for restful death I cry,
As, to behold desert a beggar born,
And needy nothing trimm'd in jollity,
And purest faith unhappily forsworn,
And gilded honour shamefully misplac'd,
And maiden virtue rudely strumpeted,
And right perfection wrongfully disgrac'd,
And strength by limping sway disabled,
And art made tongue-tied by authority,
And folly, doctor-like, controlling skill,
And simple truth miscall'd simplicity,
And captive good attending captain ill.
Tir'd with all these, from these would I be gone,
Save that, to die, I leave my love alone.

William Shakespeare, born 1564, in Stratford-upon-Avon, was the eldest son of John Shakespeare, glovemaker, and Mary Arden. At the age of 18, Shakespeare married Anne Hathaway, pregnant with their first child, and then aged 26. By 1592 Shakespeare's reputation in London was well established. He was a founding member of the company of actors called The Lord Chamberlain's Men. Shakespeare wrote two plays a year for the company. Those plays included Macbeth, The Winter's Tale, and King Lear. The company was later known as The King's Men, under the patronage of King James I. Shakespeare's work includes 154 sonnets, published in a quarto in 1609, 6 sonnets written within plays, poetry and 38 plays. Shakespeare is believed to have died at the age of 52 on 23 April 1616. He is buried in the local parish church at Stratford-upon-Avon, Holy Trinity.

Read by **Colin McPhillamy**, actor and playwright. Colin was born in London to Australian parents. He trained at the Royal Central School of Speech and Drama in London. In the UK he worked in the West End, at the Royal National Theatre for five seasons, and extensively in British regional theatre. In the USA he has appeared on Broadway, Off-Broadway and at regional centres across the country. Colin has acted in Australia, China, New Zealand, and across Europe. Colin is married to Alan Conolly's cousin Patricia Conolly, the renowned actor and stage actress: https://en.wikipedia.org/wiki/Patricia_Conolly and

https://trove.nla.gov.au/newspaper/article/47250992.

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