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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)

J and E Vella Pty Ltd v Hobson (NSWCA) - primary judge's dismissal of claims of breach of fiduciary duty upheld, as it was based on credibility findings that were neither "glaringly improbable" nor "contrary to compelling inferences" (I B)

In the matter of Premier Energy Resources Pty Ltd (NSWSC) - Court refused to validate the appointment of a company administrator where the purported appointment had been made possible by one director forging a letter of resignation by the other director (I B)

Cool-Off Pty Ltd (ABN 79 068 308 225) v Thomas Foods International Pty Limited ABN 52 008 178 121 (NSWSC) - mandatory injunction requiring an offal supplier to keep supplying offal to a pet food manufacturer dissolved, as the pet food manufacturer had (unintentionally) misled the Court when obtaining the ex parte injunction (I B)

Patel v Sengun Investment Holdings Pty Ltd (VSCA) - Heads of Agreement requiring parties to enter into a contract for the sale of land constituted a binding contract, and specific performance was ordered (I B C)

Mondib Pty Ltd v Coral Rise Pty Ltd (VSCA) - Victorian Civil and Administrative Tribunal had erred in law in concluding that. because of the invalidity a decision to extend a planning permit, that permit had to expire and was incapable of amendment (I B C)

HABEAS CANEM

Invitation to chase

Summaries With Link (Five Minute Read)

J and E Vella Pty Ltd v Hobson [2023] NSWCA 234
Court of Appeal of New South Wales
Mitchelmore, Adamson, & Ster
Expert evidence
J and E Vella Pty Ltd (JEV), Hynadam Pty Ltd, and Mechita Pty Ltd cooperated to provide freight services to Schweppes from 2001 to 2012 through a corporate entity, Beverage Freight Services Pty Limited, which effectively acted as a clearing house, allocating freight services contracted by Schweppes to JEV, Hynadam, and Mechita, but without making any profit from those services - in 2012 this cooperative relationship was brought to a sudden end, shortly after a meeting at Ingleburn between representatives of the three companies and two facilitators - thereafter, the arrangement between Schweppes and Beverage Freight Services terminated, but entities related to Hynadam and Mechita and one other freight company continued to provide those services, through a new corporate entity, Beverage Distribution Australia Pty Ltd, which again acted as a clearing house - the effect was that JEV was effectively excluded from providing freight services to Schweppes - JEV and a director commenced proceedings, contending that Hynadam, and Mechita, and their directors, had acted in breach of fiduciary duties which they owed to JEV and its director in bringing about new arrangements, and that the other relevant companies were knowingly concerned in those breaches - the primary judge dismissed these claims - JEV and its director appealed - (held by majority, Adamson JA dissenting): in order to succeed in appealing findings influenced by the credibility of witnesses, it is necessary to establish that the primary judge's findings were "glaringly improbable" or "contrary to compelling inferences" - the primary judge had not erred in rejecting JEV's director's evidence regarding the reason for the changed arrangements - the objective evidence did not support JEV's director's evidence - the obvious, and correct, inference to draw was that the director's evidence on this issue was neither credible nor reliable - the primary judge had also not erred in rejecting JEV's director's evidence as to what occurred at the Ingleburn meeting - this evidence was implausible and inconsistent - the appellants had plainly failed to show that the primary judge's conclusions were glaringly improbable - the appellants accepted that their challenges to the primary judge's findings that no fiduciary duty was owed or breached, and the consequent rejection of the knowing assistance claims, were contingent upon them succeeding in their challenge to the primary judge's conclusion as to what occurred at the Ingleburn meeting - appeal dismissed.
View Decision (I B)

In the matter of Premier Energy Resources Pty Ltd [2023] NSWSC 1185
Supreme Court of New South Wales
Williams J
Corporations - Premier Energy Resources was incorporated in 2020 to supply coal fines, and entered into a contract to supply coal fines to Delta Electricity - potential litigation with Delta arose, and the directors were in dispute whether to put the company into administration - at one

stage, there were two directors remaining of the company, Connor and Clark - Clark purportedly resigned as a director, which left Connor as the sole director - Connor purporting to act as sole director caused the company to go into administration - Clark later alleged that his signature had been forged on his letter of resignation as a director, and that the administrator's appointment was invalid - the administrator sought an order under s447A of the *Corporations Act 2001* (Cth) confirming the validity of his appointment, or, in the alternative, an order that nothing done pursuant to his appointment was invalid by reason of any contravention of a the *Corporations Act* or the Company's constitution - s447A of the *Corporations Act* confers on the Court power to make such order as it thinks appropriate about how Part 5.3A of the Act is to operate in relation a particular company - the overriding requirement for an order made under s447A is that it must be designed to achieve the objective of Part 5.3A as expressed in s435A, and that the order have a nexus with how Part 5.3A is to operate in relation to the particular company - s435A provides that the object of Part 5.3A is "to provide for the business, property and affairs of an insolvent company to be administered in a way that: (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or (b) if it is not possible for the company or its business to continue in existence”results in a better return for the company's creditors and members than would result from an immediate winding up" - Clark's evidence that he did not sign any papers to remove himself as a director was consistent with all of his correspondence with the administrator since learning of the administrator's purported appointment - that evidence was unchallenged in these proceedings - Connor, who was also the sole director and shareholder of one of the defendants, had been informed of the proceedings but did not appear - the Court accepted Clark's allegation of forgery - the question was then whether the Court should nevertheless validate the administrator's appointment or acts - once the administrator was notified of Clark's allegation that he had not in fact resigned as a director, and that his letter of resignation was a forgery, the administrator had been obliged to look into the allegation and, if he was unable to satisfy himself that his appointment was valid, to make an application to the Court - the Court rejected the administrator's contention that, although it would have been "best practice" for him to promptly investigate or to make an application to the Court, he had not been obliged to do so - an order validating the administrator's appointment would give the imprimatur of the Court to the conduct of Connor in forging, or procuring the forgery of, Clark's signature on the letter of resignation, and to the unsatisfactory conduct of the administrator in failing to investigate and promptly bring to the Court the doubts raised about the validity of his appointment - administrator's prayers for relief dismissed, ASIC register ordered to be rectified, and proceedings listed for further directions. View Decision (I B)

Cool-Off Pty Ltd (ABN 79 068 308 225) v Thomas Foods International Pty Limited ABN 52 008 178 121 [2023] NSWSC 1183
Supreme Court of New South Wales
Slattery J
Equity - Cool-Off operates a pet food processing facility in Howlong, west of Albury on the Murray River - Cool-Off had an agreement with Thomas Foods under which Thomas Foods

supplied ovine offal material from its meat processing plants - Thomas Foods gave notice of termination of that agreement, following a dispute about whether Cool Off was required to accept bone material as part of the offal supplied - Cool Off obtained an *ex parte* interlocutory mandatory injunction requiring Thomas Foods to continue to supply offal material - Thomas Foods sought to dissolve that injunction on the ground of material non-disclosure and misrepresentation, and to discontinue the supply of offal material to Cool-Off, or, in the alternative, the discharge or variation of the injunction on the grounds that there was no serious question to be tried, and that the balance of convenience favoured its discharge - held: the Court has power to grant interlocutory injunctions under s66(4) of *the Supreme Court Act 1970* (NSW), on terms, if necessary, in any case where it appears to the Court to be just or convenient - the Court must consider whether there is a serious question to be tried and then whether the balance of convenience and questions of hardship and related factors warrant the grant of an interlocutory injunction - both parties had a reasonably arguable case regarding whether the contract required Cool-Off to accept bone material, and also regarding the proper construction of the termination clause in the agreement - there was therefore a serious question to be tried - an applicant for *ex parte* injunctive relief is obliged fully and frankly to disclose all relevant matters to the Court, including those which would have been raised by the respondent in its defence if it had been afforded the opportunity to be heard - this is an obligation to be direct, frank, and to the point, and requires clearly putting the case of the absent party so the Court can understand it, despite the urgency, so the Court can appreciate what might be said against the making of the order - not every case of material nondisclosure will automatically lead to dissolution of an injunction obtained *ex parte*, but it will be a factor to which the Court must give serious weight in exercising its discretion as to whether the injunction should continue - if the plaintiff has acted culpably and the nondisclosure was part of a deliberate attempt to mislead the Court, the most likely result is that the order will be vacated - some misleading of the Court had occurred, in four categories: (1) a misdescription of the supply process; (2) a failure to explain that there were two versions of the supply agreement; (3) the availability of other sources of supply to Cool-Off; and (4) the prejudice likely to be suffered by Thomas Foods by reason of the non-collection of Bone Material - the misleading that had occurred had been because of Cool-Off's perceived urgency of the situation and had not been deliberate - however, had several of the matters now brought to the Court's attention been disclosed at the *ex parte* hearing, any grant of injunctive relief, had it been made, would almost certainly have been made on different terms - injunction dissolved, although this was stayed for 14 days to allow the parties to prepare for dissolution, or to seek leave to appeal.
View Decision (I B)

Patel v Sengun Investment Holdings Pty Ltd [2023] VSCA 238
Court of Appeal of Victoria
Emerton P, Walker, & Kaye JJA
Sale of land - the parties executed a document titled Heads of Agreement to the Purchase of Land in relation to the purchase by the applicant from the respondent of land at St Leonards for $4.1million - the applicant paid $50,000 towards that purchase price - shortly thereafter, the

respondent, through its agents, advised the applicant that it no longer wished to proceed with the transaction, and it maintained that the document was not a binding agreement for the sale of the property - the applicant insisted that the respondent's solicitor prepare a contract of sale in accordance with the Heads of Agreement - the applicant later commenced proceedings in the County Court seeking specific performance of the Heads of Agreement - the primary judge held that the Heads of Agreement did not constitute a binding contract between the parties, but that, if he had found otherwise, he would have made an order for specific performance of such an agreement - the applicant sought leave to appeal, and the respondent sought to cross-appeal against the finding that the Heads of Agreement could be enforced by an order for specific performance - held: the question whether the parties, by signing the Heads of Agreement, thereby intended to enter into a legally binding contract, was to be determined objectively, from the text of the document, construed in the context of the surrounding circumstances in which each of the parties signed it - although the applicant contended for a particular legal characterisation of the Heads of Agreement for the first time on appeal, the case concerned the construction of a document, in light of facts proved at trial, and it was therefore expedient in the interests of justice that the question should be argued and decided - the question was therefore whether, by executing the Heads of Agreement, the parties thereby entered into a binding legal contract by which the respondent, in effect, bound itself to execute a contract of sale of the property if called upon to do so by the applicant - the form of the Heads of Agreement, and the terminology employed in the document, weighed in favour of the conclusion that the document did constitute a binding contract - the fact that two clauses contemplated, and indeed required, the formulation and execution of a contract of sale, did not preclude a conclusion that the Heads of Agreement constituted a legally binding contract between the parties in respect of the sale of the property - the Heads of Agreement did constitute a legally binding contract - as to whether an order for specific performance could be made, the applicant had sufficiently established that he intended to purchase the property for personal reasons, and not simply for the purpose of redevelopment and sale at a profit - the authorities made it clear that, ordinarily, damages are not an adequate remedy for the breach by a vendor of a contract of sale of land, and in such a case an order should be made for specific performance, unless special facts are established which would justify the withholding of such relief - an appropriate order for specific performance should be made - leave to appeal granted, appeal allowed, and respondent ordered to forward to the applicant a notice under s27(3) of the *Sale of Land Act 1962* (Vic) and a contract for sale of the property containing the terms required by the Heads of Agreement, any other terms necessary to give effect to the sale of the property consistently with the Heads of Agreement, and any other terms agreed by the parties.
Patel (I B C)

Mondib Pty Ltd v Coral Rise Pty Ltd [2023] VSCA 237
Court of Appeal of Victoria
Emerton P, Beach JA, & Garde AJA
Planning law - Mondib is a property developer that sought to develop a vacant site at Moonee Ponds - Moonee Valley City Council granted a permit for the use and development of the land

for a multi-storey, mixed use building including retail and dwellings, with an approved height of about 50m - a delegate of the Council extended the permit by two years in 2016, and a further two years in 2020 - in 2017, the Moonee Valley Planning Scheme had been amended to introduce a mandatory height control of 32m over the subject land - Mondib sought to amend the permit to modify the uses of the proposed building to remove the dwelling and retail uses, decrease the office uses, increase the residential hotel use, and introduce a restaurant use with associated internal alterations and external built form variations - the owner of a nearby hotel objected - Council refused this application - Mondib applied to the Victorian Civil and Administrative Tribunal for a review of this refusal - the nearby hotel owner applied to the Tribunal for declarations that the two extensions were invalid and of no effect - the Tribunal dismissed Mondib's application for review, and declared in substance that the second extension was invalid and of no effect - Mondib sought leave to appeal to the Court of Appeal - held: it is not correct to say as a matter of construction that because some provisions in the Act enumerate mandatory factors, it follows that, where the Act does not set out mandatory factors, mandatory facts cannot implied - each head of power must be construed in its own right to determine whether there are implied mandatory considerations that arise from the subject matter, scope, and purpose of the Act - it followed by necessary implication from the Act that a responsible authority must have regard to the current form of the planning scheme when considering an application for a permit extension - the Tribunal had been correct to hold that, that in determining the second extension application, it was bound to consider the current state of the planning scheme at the time when the extension application was considered, including the height control change to 32m - the exercise of the Tribunal's discretion to declare the second extension to be invalid and of no effect had both an evident and intelligible justification for the reasons given by the Tribunal - the Tribunal's decision had therefore not been legally unreasonable - however, the Tribunal had erred in law in concluding that, as a consequence of the invalidity of the second extension, the permit had to expire and was incapable of amendment - there is no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside - a decision involving jurisdictional error therefore does not prevent the decision-maker from correcting that error by making a later decision - the true outcome of the invalidity of the second extension decision was that Council was obliged to consider Mondib's second extension application again and determine whether it should be granted - leave to appeal granted and appeal allowed in part - proceedings remitted to the Tribunal to be heard and determined again by the same or a differently constituted Tribunal according to law, with the hearing of further evidence by the Tribunal.

Mondib Pty Ltd (I B C)

Poem for Friday

Love is Not All (Sonnet XXX)

By: Edna St. Vincent Millay (1892-1950)

Love is not all: it is not meat nor drink
Nor slumber nor a roof against the rain;
Nor yet a floating spar to men that sink
And rise and sink and rise and sink again;
Love can not fill the thickened lung with breath,
Nor clean the blood, nor set the fractured bone;
Yet many a man is making friends with death
Even as I speak, for lack of love alone.
It well may be that in a difficult hour,
Pinned down by pain and moaning for release,
Or nagged by want past resolution's power,
I might be driven to sell your love for peace,
Or trade the memory of this night for food.
It well may be. I do not think I would.

Edna St. Vincent Millay, an American poet and playwright was born on 22 February 1892 in Maine. Her mother was a nurse and her father a schoolteacher. Her middle name is from St. Vincent's Hospital, New York City, where her uncle had recovered from a serious illness just before she was born. Her parents separated when she was young. She won poetry competitions from an early age. Her first well known poem was *Renascence*, written while she was still a teenager. She was well known as a feminist in the 1920s in New York City. She won the Pulitzer Prize for poetry in 1923. One of her best known collections of poetry is *The Ballad of the Harp- Weaver*. She died on 19 October 1950, aged 58, in Austerlitz, New York.

Jodie Foster reads *Love is Not All* by **Edna St. Vincent Millay**
https://www.youtube.com/watch?v=9ZEIyGriOEo&list=PLTR8eXa0mGYb-t7MI17Lht6BdSbbFCMWp&index=23

Edna St. Vincent Millay, reads her poem *Love is Not Al*
https://www.youtube.com/watch?v=mvgDAOG8W6c

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