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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)

Clee Capital Pty Ltd v IOUpay Limited (FCA) - application by a shareholder for interlocutory orders restraining the activities of a listed company suspected to have been the victim of fraud dismissed (B I)

Smith v Trustee of the Property of Richard John Smith (a Bankrupt) (FCA) - Trustee's Notice of Objection to automatic discharge from bankruptcy had not given sufficient reasons for objection and was invalid - applicant had been automatically discharged (B)

Russell v S3@Raw Pty Ltd (FCA) - interlocutory application to require defendant to delete Instagram posts and not re-publish material refused, despite there being a serious question to be tried and the balance of convenience favouring such an injunction, because of the caution with which courts will exercise their power to restrain publications (I)

ATL (Australia) Pty Ltd v Cui (NSWSC) - one guarantor's defence of *non est factum* failed - another guarantor's defence of forged signature succeeded (I B C)

Moss & Anor v Coghill (NSWSC) - procedural directions made in medical negligence action, including leave to rely on a late served and large evidentiary statement, orders allowing access to all the plaintiffs social media refused, and a statement from a talent agent allowed (I)

Thomson v Victorian WorkCover Authority (VSC) - Court declined to quash Medical Panel's

determinations that the plaintiff's psychological conditions were in substantial remission, that his work incapacity was not permanent, and that particular work was suitable for him (I)

DWD Project Pty Ltd & Anor v Northern Territory Environment Protection Authority (NTCA) - convictions for intentionally failing to comply with Pollution Abatement Notices after the dumping of fill material containing pollutants upheld (C I)

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Summaries With Link (Five Minute Read)

Clee Capital Pty Ltd v IOUpay Limited [2023] FCA 312
Federal Court of Australia
Jackman J
Corporations law - the respondent is a public company listed on the ASX that specialises in fintech and digital commerce software and services in Southeast Asia - it has a Malaysian subsidiary which in turn has its own Malaysian subsidiary - the respondent notified the ASX of suspected misappropriation in Malaysia - the applicant is a shareholder in the respondent - the applicant, together with four other shareholders, gave notice of intention to move for the removal of the respondent's directors, and requested a general meeting - the directors called the meeting for May 2023 - the plaintiff commenced proceedings against the respondent, alleging oppression under s232 of the *Corporations Act* - the plaintiff sought interlocutory orders that the respondent and its subsidiaries be restrained (1) from making any payments or incurring any liabilities other than in the ordinary course of business, or in investigating or recovering the misappropriated funds, or in connection with the current proceedings, (2) from raising capital or entering into loan agreements, and (3) from destroying or deleting any books, records, or information generated or stored in the course of its business - the applicant also sought an order that the respondent and its subsidiaries make their books available to a the applicant's investigator - held: the applicant did not suggest the CEO of the respondent was engaged in fraud and expressly disclaimed any allegation of dishonesty by anyone in the management of the respondent - the Court accepted without deciding that maladministration or failures of corporate governance were capable of being oppression - however, there was no failure or continuing failure by the respondent or its directors to investigate the fraud - the respondent appeared to have moved quickly to investigate the suspected fraud, and had engaged accountants in Malaysia to urgently do so - the plaintiff's application for oppression, on the current evidence, was weak, and did not amount to a serious question to be tried - as to the balance of convenience, it was difficult to predict what impact the proposed restraints would have on any proposed capital raising, but it would appear possible that they might prejudice any such transaction - application for interlocutory relief dismissed.
Clee Capital Pty Ltd (B I)

Smith v Trustee of the Property of Richard John Smith (a Bankrupt) [2023] FCA 300
Federal Court of Australia
Collier J
Bankruptcy - shortly before the applicant was to be automatically discharged from bankruptcy, his Trustee in bankruptcy filed a Notice of Objection, purporting to extend the discharge date to 2027 - the Trustee relied on s149D(1)(aa) & (ab) of the *Bankruptcy Act 1966* (Cth), in that a transfer had been void against the Trustee pursuant to ss120, 121, or 122 of the *Bankruptcy Act* - the Trustee alleged that the applicant had transferred almost $1million to his spouse through a series of transactions shortly after the failure of his business, and that this was done with the assistance of his legal advisor, for no consideration, and to defeat trade creditors of the

business to whom the applicant had given personal guarantees - after the date of automatic discharge had passed, the Trustee issued a second Notice of Objection, apparently designed to address deficiencies in the first Notice - the Trustee issued a third Notice of Objection providing more extensive detail - the applicant applied to the Federal Court seeking declarations that all three Notices were invalid and that he had been automatically discharged from bankruptcy - held: s195C of the *Bankruptcy Act* required the Trustee to state the reasons for his objection to discharge in the first Notice - those reasons had to be sufficient to enable the bankrupt to understand the objection and its basis, and respond accordingly - it was difficult to separate evidence from speculation in the first Notice - purported statements of evidence were mere recitations of fact - the "series of transactions" alleged was not clearly identified - the Notice referred to no evidence of a lack of consideration provided by the spouse - the identity of the legal advisor and the nature of the assistance provided was not particularised - the "reasons" stated in the Notice were merely recitations of the statutory grounds on which the Trustee relied, and did not address the relevance of the applicant's conduct to those grounds, or state a judgment as to whether the applicant's conduct had engaged those grounds - the first Notice had been invalid - automatic discharge had taken place at the relevant date - the second and third Notices had been filed after the automatic discharge and were also invalid - declarations made that all three Notices were invalid and that the applicant had been discharged from bankruptcy on the automatic discharge date.
Smith (B)

Russell v S3@Raw Pty Ltd [2023] FCA 305
Federal Court of Australia
Meagher J
Defamation - the respondent made various posts on Instagram that arose from failed negotiations for the sale of the respondent's business - the applicant commenced proceedings in the Federal Court for defamation - the applicant sought an interlocutory injunction requiring the respondent to take down the posts, and to refrain from re-publishing them - held: the Court has power under s23 of the *Federal Court Australia Act 1976* (Cth) to grant an interim injunction, including an interim injunction to enjoin the commission of a tort - this includes restraining the publication of defamatory statements - however, the power to restrain publication must be exercised with great caution, and only in very clear cases - the law has great regard for freedom of speech - if there is any real ground for supposing that a respondent may succeed at trial, an injunction would ordinarily be refused - injunctive relief may be granted where repeated defamatory publications have the flavour of a vendetta, where it is likely the defendant will continue to publish statements found to be unwarranted or in whose truth the publisher has an irrational view, where the publisher shows disrespect for the court process, where the vehemence of language indicates an intention to continue to publish defamation unless restrained, and where the publication causes harassment by third parties - the applicant had demonstrated there was a serious question to be tried - as to the balance of convenience, the first respondent had pleaded no defence other than denying publication, and another defendant had not appeared at the interlocutory hearing - damages will be difficult to quantify and unlikely

to be an adequate remedy due to the nature of social media - the first respondent was a two dollar company - the other respondent resides overseas - the applicant seeks to run a business relevant to the defamatory material - the balance of convenience weighed in favour of granting the injunction - however, given the authorities emphasising the caution with which courts will restrain publication, the question whether to make the injunctions was finely balanced - deciding factor was that the posts did not have the flavour of a vendetta - on balance, the injunctions should not be granted - interlocutory application dismissed.
Russell (l)

ATL (Australia) Pty Ltd v Cui [2023] NSWSC 336
Supreme Court of New South Wales
Fagan J
Contract law - the plaintiff advanced $14million to a borrower under a commercial loan agreement - four guarantors also signed the agreement - borrower defaulted and the plaintiff sued a number of parties - by the time of judgment, the only active defendants were the second defendant (one of the guarantors) and the eleventh defendant (a company alleged to be a fifth guarantor under a separate deed of guarantee) - the second defendant pleaded *non est factum*, claiming that he believed he was only executing the guarantee as a director of the borrower and as a director of the trustee of his family trust - alternatively he sought relief under the *Contracts Review Act 1980* (NSW) and said that a side agreement between the borrower and the plaintiff had altered the circumstances of his guarantee and discharged him from liability - the eleventh defendant said the purported signature of its director was a forgery, that its director had not signed a statutory declaration purportedly ratifying that signature, and that statutory declaration did not ratify that signature - eleventh defendant also disputed that the fifth guarantee was a deed and said the guarantee was unsupported by consideration - held: *non est factum* is available where a defendant is unable to read owing to blindness or illiteracy and has to rely on others for advice as to what he or she is signing; and also to those who, through no fault of their own, are unable to understand a document they are signing - the defendant must show he had the belief the document was radically different from what it was, and that, at least as against innocent parties, his failure to read and understand was not due to his carelessness - the defendant bore a heavy onus of proof to show he had not understood the document - he had failed to discharge that onus - he was a rational person with a general understanding of commercial matters - even were this not the case, his carelessness would have defeated his *non est factum* plea - the fact that the second defendant did not see the loan agreement until he was asked to sign it immediately, without the opportunity to seek legal advice, did not give rise to unfairness, because his only complaint was that he did not know he was signing as a guarantor - the Court had already found this complaint was false - no relief under the *Contracts Review Act* - the side agreement between the borrower and lender had no effect on the second defendant's obligations, and, in any event, was made before the second defendant signed as guarantor - as for the eleventh defendant, the Court compared the impugned director's signature with genuine samples for itself, and was not satisfied on the balance of probabilities that the signature was genuine - Court was satisfied the director singed the statutory

declaration, but was not satisfied the director understood its contents and was therefore not satisfied the statutory declaration operated as a ratification of the fifth guarantee - not necessary to consider whether the fifth guarantee was a deed - judgment for plaintiff against the second defendant - plaintiff's claim against the eleventh defendant dismissed.
View Decision (I B C)

Moss & Anor v Coghill [2023] NSWSC 341
Supreme Court of New South Wales
Chen J
Medical negligence - the first plaintiff is an apparently well-known author, documentary maker/presenter, journalist, and former model who sued her former GP for medical negligence - she alleged the GP had negligently failed to diagnose a right labral tear, causing significant ongoing hip and pelvic pain - the second plaintiff was a company through which the first company operated her business, which claimed damages for loss of services - the defendant objected to the first plaintiff's evidentiary statement, which was served very late and was very large - the defendant also sought an order compelling the plaintiff to provide access to all social media accounts and platforms - the defendant also said that a proposed statement from the CEO of the Harry M Miller Group, the plaintiff's talent agency, which was relevant to causation and damages, was not admissible as it appeared at least partially to be opinion evidence and the CEO was not relevantly an expert - defendant also said the plaintiffs did not have leave to rely on further expert evidence on damages - held: the late served evidentiary statement had changed the forensic landscape somewhat - the use of the new material did not cause any unfair prejudice to the defendant - the just resolution of the real issues in dispute required the first plaintiff have leave to rely on her evidentiary statement - the Court was not taken to any authorities dealing with its power to make an order for access to all social media accounts in the broad terms sought by the defendant, but the Court did not doubt that, in an appropriate case, where the interests of justice demonstrated it was appropriate, such an order could be made - Court was not persuaded that the defendant had made a case for the potentially onerous and undoubtedly invasive orders sought - however, the plaintive should give discovery of such material with categories to be agreed or determined at a later time - as to the evidence of the talent agent, now was not the time to determine whether the content of evidentiary statements would be admissible - the Court was not prepared to entertain an application for an advance ruling on admissibility under s192A of the *Evidence Act 1995* (NSW) - on the basis that the plaintiffs clarifying that they did not intend to use the talent agent's testimony as opinion evidence, an extension of time granted to rely on her statement.
View Decision (I)

Thomson v Victorian WorkCover Authority [2023] VSC 164
Supreme Court of Victoria
Ierodiaconou AsJ
Workers compensation - the plaintiff claimed he was extremely overworked over three and a half years by his employer, the Movember Group, leading to psychiatric breakdown, anxiety,

depression, and the need for intensive medical treatment - he alleged increasing responsibilities, including overseas IT operations, and extreme overwork culminated in exhaustion and mental breakdown following a 2.5 week business trip to London - made a serious injury application under the *Accident Compensation Act 1985* (Vic) in respect of a claimed permanent severe mental or behavioural disturbance or disorder - the employer's insurer, the Victorian WorkCover Authority, rejected the application - the plaintiff commenced proceedings in the County Court seeking leave under Division 2 of Part 7 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) to issue common law proceedings - District Court referred specific questions to a Medical Panel - Panel determined the plaintiff was suffering from a major depressive disorder in substantial remission and abnormal personality traits, that the plaintiffs current work incapacity was not permanent and that suitable employment would be as an ICT Customer Support Officer or a Network Administrator, after suitable training, with a graduated return to full time hours - the plaintiff applied to the Supreme Court to quash the Panel's opinion and have the questions remitted to a differently constituted Medical Panel - held: in determining that the plaintiff's work incapacity was not permanent, the Panel did not make a determination for which there was no evidence or which was not open on the evidence before it, and did not misdirect itself or fail to perform its proper statutory function - in determining that the plaintiffs psychological conditions were in substantial remission, the Panel again did not make a determination for which there was no evidence or which was not open on the evidence before it - the Panel's statement of reasons was adequate - proceedings dismissed.
Thomson (I)

DWD Project Pty Ltd & Anor v Northern Territory Environment Protection Authority [2023] NTCA 3
Court of Appeal of the Northern Territory
Grant CJ, Kelly, & Blokland JJ
Contamination - the appellants were a company that owned land in Darwin and the sole director and shareholder of that company - the Authority alleged the appellants had dumped a large volume of uncontrolled fill material containing a range of pollutants on the company's land, on the adjacent Crown land, and in the water immediately adjacent to the Crown land - Authority issued Pollution Abatement Notices, requiring the appellants to remove all wastes and contaminants, to correct the land/sea boundary, and to provide specified plans and reports - the Authority twice issued revised Notices extending the dates for compliance - the final revised Notices omitted the words "on reasonable grounds" from its statement that the Authority believed the respondents had committed an offence under s83(1), or contravened s12, of the *Waste Management and Pollution Control Act 1989* (NT) - the appellants did not comply with the Notices - the Authority prosecuted the appellants for contravention of s83(1) of the *Waste Management and Pollution Control Act* by the original dumping, summary offences under s75 of the *Planning Act 1999* (NT), and an offence under s80(1) of the *Waste Management and Pollution Control Act* for intentionally failing to comply with the Notices - the Local Court convicted each appellant and fined the company $250,000 and the director $50,000 - appeal to

Supreme Court dismissed with costs - further appeal to Court of Appeal - held: the appellants' contention that their convictions under s80 could not stand because the Notices were not in the approved form (having omitted the words "on reasonable grounds") must be rejected - this contention elevated form over substance - any deviation from the approved form could not have been misleading - strict compliance with the approved form was not required, pursuant to s68 of the *Interpretation Act 1978* (NT) - the limitation period to bring the charges under s80 had not expired - the factual basis for the s80 charges was the intentional failure to comply with the Notices - the offence was committed on the date that failure occurred - the Supreme Court had not erred in awarding the Authority its costs of the appeal to the Supreme Court - appeal dismissed.
DWD Project Pty Ltd & Anor (C I)

Poem for Friday

Annabel Lee

By: Edgar Allan Poe (1809-1848)

It was many and many a year ago,
In a kingdom by the sea,
That a maiden there lived whom you may know
By the name of Annabel Lee;
And this maiden she lived with no other thought
Than to love and be loved by me.

I was a child and *she* was a child,
In this kingdom by the sea,
But we loved with a love that was more than love—
I and my Annabel Lee—
With a love that the wingèd seraphs of Heaven
Coveted her and me.

And this was the reason that, long ago,
In this kingdom by the sea,
A wind blew out of a cloud, chilling
My beautiful Annabel Lee;
So that her highborn kinsmen came
And bore her away from me,
To shut her up in a sepulchre
In this kingdom by the sea.

The angels, not half so happy in Heaven,
Went envying her and me—
Yes!—that was the reason (as all men know,
In this kingdom by the sea)
That the wind came out of the cloud by night,
Chilling and killing my Annabel Lee.

But our love it was stronger by far than the love
Of those who were older than we—
Of many far wiser than we—
And neither the angels in Heaven above
Nor the demons down under the sea
Can ever dissever my soul from the soul

Of the beautiful Annabel Lee;

For the moon never beams, without bringing me dreams
Of the beautiful Annabel Lee;
And the stars never rise, but I feel the bright eyes
Of the beautiful Annabel Lee;
And so, all the night-tide, I lie down by the side
Of my darling—my darling—my life and my bride,
In her sepulchre there by the sea—
In her tomb by the sounding sea.

Edgar Allan Poe, was born on 19 January 1809, in Boston, the son of two actors. His father left the family in 1810, and his mother died in 1811. He was taken in by a couple who raised him. He was an American author and poet, and literary journal writer. He was a writer of crime stories, mysteries, and is said to have inspired many, including for example, Alfred Hitchcock in the making of suspense films. He was one of the first American writers whose works became popular on the European continent, and more particularly in France. His literary reviews earned him the name "tomahawk man". His first poetry volume under the pseudonym "the Bostonian" was published in 1827. Sir Arthur Conan Doyle said of Poe's detective stories that each story "*Is a root from which a whole literature developed" and said: "Where was the detective story until Poe Breathed the beath of life into it".* His poem "The Raven" was received well when published in January 1845. Poe wrote "*Words have no power to impress the mind without the exquisite horror of their reality*". In his letter to George W. Evelath on 4 January 1848 he wrote "*I became insane, with long intervals of horrible sanity*". Poe died 7 October 1849. His attending doctor reported that Poe's final words were *"Lord help my poor soul*". The cause of death is not clearly known, however there were many suggestions, including a possibly physical attack on him, or alcoholism, or cholera or various other diseases.
https://en.wikipedia.org/wiki/Edgar_Allan_Poe

Joan Baez, sings Annabel Lee
https://www.youtube.com/watch?v=AIGj3CZ3uPQ

The Raven, read by James Earl Jones
https://www.youtube.com/watch?v=WcqPQXqQXzI

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