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Daily Civil Law
A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (One Minute Read)

Duncan v Bert Farina Constructions Pty Ltd (SASCA) - s73 of the *Development Act 1993* (SA) and s159 of the *Planning, Development and Infrastructure Act 2016* (SA) impose a 10 year longstop limitation period for claims for economic loss or rectification costs arising out of defective building work, and do not displace other statutory provisions that impose a shorter time limitation on any such claims, such as s32(5) of the *Building Work Contractors Act 1995* (SA) (B C I)

Sunflower Care Services Pty Ltd v Commissioner of the NDIS Quality and Safeguards Commission (FCA) - interlocutory injunction made against a banning order in respect of an NDIS provider, where there was a serious question to be tried that proper notice had not been given, and there were six NDIS participants who relied on that provider (I B)

McMillan v Coolah Home Base Pty Ltd (NSWCA) - owners and controllers of a caravan park where the occupiers held their sites under company title had not engaged in oppressive conduct to the extent the occupiers alleged (I B)

Haddad v The GEO Group Australia Pty Ltd (NSWCA) - a workers compensation applicant cannot rewrite the facts by limiting a claim to medical treatment expenses only, thereby avoiding the relevance of evidence of incapacity for the purposes of the time limitation in s261 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) (I B)

Sultan v Dabboussi (NSWSC) - Supreme Court proceedings transferred to Federal Circuit and

Family Court where there was commonality of issues between the Supreme Court proceedings and family law proceedings also on foot, and the Federal Circuit and Family Court was the natural forum (I B)

Archer Wealth v Casey (VSC) - caveat ordered to be withdrawn, as a mortgagor's equity to have an improper sale of mortgage property set aside is a 'mere equity' and not the 'estate or interest in land' which a person must have in order to lodge a caveat (B C I)

Douglas v Strata Corporation No 15944 (TASSC) - Court refused to grant an interlocutory injunction where there was an allegation of nuisance by water flowing from one property to another (I B C)

Block 27 Pty Ltd v Qursa Pty Ltd (ACTCA) - equitable relief refused to sublessor, where the terms of the sublease giving rise to the sublessor's equity were in breach of its obligations under the head Crown lease (I B C)

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Summaries With Link (Five Minute Read)

Duncan v Bert Farina Constructions Pty Ltd [2024] SASCA 67
Court of Appeal of South Australia
Doyle & Bleby JJA, & Blue AJA
Builders' statutory warranties - home owners sued a builder alleging defective building work, relying on alleged breaches of statutory warranties under s32(2) of the *Building Work Contractors Act 1995* (SA) and common law negligence - s32(2) has a five year limitation period stated in s35(5) - s73 of the *Development Act 1993* (SA) (and its successor, s159 of the *Planning, Development and Infrastructure Act 2016* (SA)) has a 10 year limitation period for actions for damages for economic loss or rectification costs resulting from defective building work - the owners contended the time limit was 10 years pursuant to s73 of the *Development Act* - the builder contended the time limit was 5 years pursuant to s32(5) of the *Building Work Contractors Act* - the primary judge held that, in in proceedings for damages for defective building work relying on breach of a statutory warranty under s32(2), the five year period under s32(5) applies, and is not displaced by s73 of the *Development Act* - the owners appealed - held: on its proper construction, s73 of the *Development Act* (and its successor, s159 of the *Planning, Development and Infrastructure Act*) merely impose a 10 year longstop limitation period for claims for economic loss or rectification costs arising out of defective building work - it does not affirmatively say that a person wishing to bring such a claim has a right to do so for 10 years - it therefore does not displace any other statutory provisions that impose a shorter time limitation on any such claims - appeal dismissed.
Duncan (B C I)

Sunflower Care Services Pty Ltd v Commissioner of the NDIS Quality and Safeguards Commission [2024] FCA 589
Federal Court of Australia
Feutrill J
Administrative law - Sunflower Care Services is a registered National Disability Insurance Scheme provider - a delegate of the Commissioner made a banning order under s 73ZN of the *National Disability Insurance Scheme Act 2013* (Cth) against the directors of Sunflower, who then resigned, and sought to notify Sunflower that he was considering making decisions to suspend its registration, to revoke its registration and to make a banning order against it, and invited Sunflower to make submissions - Sunflower and one of its former directors sought judicial review under s39B of the *Judiciary Act 1903* (Cth) and s5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) of conduct of the Commissioner (through the delegate) preparatory to making decisions and the decision to make the banning orders against the former director - the applicants also sought interlocutory relief - held: the applicants had to show a serious question to be tried and that the balance of convenience favoured making the interlocutory injunction - the strength of an applicant's case is a factor to be considered in determining where the balance of convenience lies - there appears to be a serious question to be tried as to whether Sunflower had been given notice as required by s73P(4) and therefore

whether it had been given any opportunity to make submissions, for the purposes of s73ZN(7) - as to the balance of convenience, Sunflower is dependent on income it receives from NDIS-funded participants for its financial viability - Sunflower has six NDIS participants, who had disabilities with high-level needs and behavioural issues - there did not appear to be any imminent risk of harm to the participants posed by Sunflower continuing to provide supports and services to them, and, the evidence suggested that at least, in the short-term, the opposite was true - there was also merit in the former director's assertions of a serious question to be tried - interlocutory orders made preventing a banning order against Sunflower, and suspending the operation of the banning order against the former director, until at least the conclusion of the hearing.
Sunflower Care Services Pty Ltd (I B)

McMillan v Coolah Home Base Pty Ltd [2024] NSWCA 138
Court of Appeal of New South Wales
Ward P, Leeming & Stern JJA
Real property - the respondents established a home base for "grey nomads" in the central west of NSW, and owned and operated a caravan park for that purpose - residents of the park owned their sites via company title, in that they owned a share in the first respondent which entitled the holder exclusively to occupy a specific site in the caravan park - disputes arose between some residents of the park and the respondents - the directors of the first respondent placed it into voluntary administration, under which the park was sold to the second respondent, also owned by those directors - the appellants commenced proceedings, seeking declarations that they had equitable ownership interests in their sites, the rescission of the transfer of the park to the second respondent, and compensation for breaches of directors' duties, oppression, and unconscionable conduct, harassment and coercion - the primary judge dismissed most of the claims, but found that there had been some oppression, and made orders permitting the appellants to seek an order for the winding up of the first respondent - the appellants also obtained relief in NSW Civil and Administrative Tribunal that the second respondent was bound by the terms of the previous arrangements with the first respondent - the appellants appealed - held: the primary judge had not erred in finding that the appellants were not promised ownership of the land - the sale of the park to the second respondent had not been oppressive, as this sale had been carried out by the administrators, not the directors - the administrators were not bound by the first respondent's constitution - the primary judge had been correct not to order recission of the sale, as the claim was not a derivative suit on behalf of the first respondent, and the first respondent may not be able to repay the purchase price - the appellants had not shown they had relied on any alleged misrepresentations - the aggregated behaviour of the respondents over several years and several disputes was not a course of conduct or a system of conduct for the purposes of the *Australian Consumer Law* - appeal dismissed.
View Decision (I B)

Haddad v The GEO Group Australia Pty Ltd [2024] NSWCA 135
Court of Appeal of New South Wales

Kirk & Stern JJA, & Griffiths AJA
Workers compensation - the appellant was employed as an immigration detention officer at Villawood between 1998 and 2001, and then worked for other employers until 2016 - in 2017, he was diagnosed with severe PTSD and major depressive disorder, which his psychologist attributed to witnessing certain events during his employment at Villawood - in 2021, he claimed under the *Workers Compensation Act 1987* (NSW) for weekly compensation payments and medical expenses from 2017 onwards - he later withdrew the claim for weekly payments - the Deputy President of the Personal Injury Commission determined the deemed date of injury was in 2017 (the date of incapacity) rather than in 2021 (the date of claim), and the claim for medical expenses was therefore time barred by s261 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) - the appellant appealed - held: the Court rejected the contention that the appellant could effectively rewrite the facts by reformulating his claim for compensation and limiting it to a claim for medical treatment expenses, thereby avoiding altogether the relevance of evidence of incapacity for the purposes of s261 of the 1998 Act - the Deputy President had not erred in relying on previous authority of the Court when rejecting the appellant's contention that, because he had abandoned his claim for weekly compensation, there was no relevant "incapacity" for the purposes of s15(1)(a)(i) of the 1987 Act - appeal dismissed.
View Decision (I B)

Sultan v Dabboussi [2024] NSWSC 683
Supreme Court of New South Wales
Williams J
Cross-vesting - Sultan commenced proceedings in the Equity Division of the Supreme Court against Dabboussi and others, seeking damages of about $5.2million for alleged false representations, alleged misleading or deceptive conduct, and alleged breaches of contract, arising out of Sultan giving money to Dabboussi for him to invest in particular investments where Dabboussi had allegedly represented he would pay a 100% return on capital by a specified date - Sultan also claimed a declaration that he has an equitable interest in real property at Condell Park owned by Dabboussi, and a declaration that he has a proprietary interest in 50% of the net proceeds of sale of a property at Horningsea Park that had been owned by Dabboussi and Dabboussi's former wife, based on an alleged oral agreement between Mr Dabboussi and Mr Sultan that the moneys invested, and the allegedly promised return, would be secured against the Condell Park property and against Dabboussi's interest in the Horningsea Park property - Dabboussi's former wife commenced proceedings in the Federal Circuit and Family Court (Division 2) seeking orders under s79 of the *Family Law Act 1975* (Cth) altering the interests of Dabboussi and his former wife in property of the marriage - the Supreme Court judge became aware of the family law proceedings, and informed the parties he was considering making an order under s5 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW) transferring the Supreme Court proceedings to the Federal Circuit and Family Court - Sultan opposed transfer, and Dabboussi supported it - held: the Court was satisfied the Federal Circuit and Family Court would have jurisdiction over the Supreme Court claim - the Federal Circuit and Family Court has

original jurisdiction with respect to "matters" in respect of which proceedings may be instituted under the *Family Law Act*, including property settlement proceedings, which extends to the determination of the whole of the justiciable controversy, including any aspects of that controversy that depend on State law rather than federal law - the Supreme Court proceedings and the family law proceedings shared a common substratum of facts, notwithstanding that the family law proceedings involved wider and additional issues - the Court was then required to have regard to each of the matters in s5(1)(b)(ii)(A), (B) and (C) in determining whether it was more appropriate that the proceedings be determined by the Federal Circuit and Family Court - only consideration (C), the interests of justice, was relevant here - there was sufficient commonality of issues between the Supreme Court proceedings and the family law proceedings that the interests of justice required that they should all be determined by one court, and the Federal Circuit and Family Court was the natural forum for that proceeding - the interests of justice transcend the interests of any one party - Supreme Court proceedings transferred to the Federal Circuit and Family Court.
View Decision (I B)

Archer Wealth v Casey [2024] VSC 300
Supreme Court of Victoria
Moore J
Caveats - Kookee is the registered proprietor of land - Archer loaned Kookee $4,325,000 and was granted a mortgage over the property and three other properties - Archer later loaned Kookee another $700,000 and was granted second mortgage over these properties - Archer assigned part of its interest in the first and second mortgages to other parties - Kookee did not repay the loans, and Archer and these other parties took possession of the property and sought to exercise their power of sale to sell the property for $850.000, based on an independent valuation of the property at $800,000 - the director of Kookee commenced proceedings against Archer and the other parties, seeking to restrain them from selling the property for less than $1.4million - Archer had complied with an order in these proceedings requiring it to provide the director with a copy of the contract of sale, but no further steps had been taken in those proceedings - Kookee lodged a caveat in respect of the property - Archer and the other parties with an interest in the mortgages commenced proceedings seeing orders for the withdrawal of the caveat - held: caveats under the Torrens system are treated by the courts as analogous to applications for interlocutory injunctive relief - when application is made for their removal the onus falls on the caveator to satisfy the two-stage test used by the courts when deciding whether to exercise discretion to grant interlocutory injunctive relief, that is, whether there is a serious question to be tried and where the balance of convenience lies - only a legal or equitable interest in land can sustain a caveat - under binding Court of Appeal authority, a mortgagor's equity to have an improper sale of mortgage property set aside is a 'mere equity' and not the 'estate or interest in land' which a person must have in order to lodge a caveat - there was therefore no reasonable question to be tried - in any event the balance of convenience would also have favoured their removal - caveats ordered to be withdrawn.
Archer Wealth (B C I)

Douglas v Strata Corporation No 15944 [2024] TASSC 25
Supreme Court of Tasmania
Porter AJ
Nuisance - water flowed from the defendant's property downhill onto the plaintiff's property - the plaintiff sued the defendant for damages and injunctive relief in nuisance - the plaintiff alleged that the flow of water had severely undermined the retaining wall, which was presently propped up, and that expert advice was that it was in need of replacement, with an estimated cost of about $320,000 - the plaintiff also applied for an interlocutory injunction - held: the plaintiff has a relatively strong case in relation to past events - the question was whether the plaintiff could, at trial, establish a case in respect of the risk of future "episodes" of nuisance arising from the defendant's reticulated water system - the Court accepted there was a prospect of the plaintiff establishing that, due to the apparent inherent defects in the reticulated water system, there would be repetition - the plaintiff asked that the defendant be enjoined from operating or permitting to be operated its reticulated water system so as to cause of permit water to be discharged from its property - this would require the defendant to carry out further investigations of the system, in circumstances where it asserts that any problematic source of water is elsewhere - there has been debate over whether, in the case of a mandatory injunction, an applicant must show that its case is strong to the extent that the court has a 'high degree of assurance' that such an order is appropriate - the question is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction - interlocutory mandatory injunctions are more likely to issue where the defendant is compelled, not to embark upon a fresh course of conduct, but to revert to a course of conduct pursued before the occurrence of the acts or omissions that provoked the litigation - the order sought would put the defendant in an uncertain position, and that uncertainty would make the order difficult to enforce - further, where the grant or refusal of an interlocutory injunction in effect would finally dispose of the action, closer attention needs to be paid to the strength of a plaintiff's case for final relief and the likelihood of success - in such a case, an injunction ought not to be granted if the consequence is to deny a defendant an effective right to trial where they have put forward an arguable case and the plaintiff's case is not overwhelming - the Court was satisfied there was a serious question to be tried in relation to the risk of a recurrence of leaking from the defendant's reticulated water system, but on the material, did not think the case was a compelling one - the Court was therefore not satisfied the relief should be granted - application for interlocutory injunction dismissed.
Douglas (I B C)

Block 27 Pty Ltd v Qursa Pty Ltd [2024] ACTCA 16
Court of Appeal of the Australian Capital Territory
Mossop, Baker, & McWilliam JJ
Equity - a Crown lease over a multi-level carpark required the lessee to grant a sublease of parking spaces to each owner in an adjoining block, and required terms in each sublease requiring it to travel with its associated unit - the lessee subleased four parking spaces to

Takeshi, owner of Unit 1 in the adjoining block - the sublease did not include the terms required by the Crown lease, but contained a term requiring the Crown lessee's/sublessor's consent to transfer - Block 27 became lessee under the Crown lease - after Block 27 had paid for the Crown lease, but before this was registered, Qursa became registered owner of Unit 1 - Takeshi obtained consent from the previous Crown lessee/sublessor (whose directors were the same as Takeshi's), but not from Block 27 - Block 27 sued - the primary judge dismissed the proceedings (see Benchmark 15 June 2023) - Block 27 appealed - held: Crown leases are of fundamental importance to the ACT government and the land planning and development system - even though a private law concept is used as the foundation for land planning and development in the ACT, the Court must recognise the public policy implemented through that concept - the ability to rely on extrinsic material for contract construction is, in the case of Torrens title registrable instruments, limited by the principle that such an instrument must be construed without the aid of extrinsic materials - properly construed, the sublease could not be read as picking up the terms required by the Crown lease - the trial judge had therefore erred - an equitable maxim is merely a summary statement of a broad theme, and, without more, it may be wrong to simply invoke a maxim as a basis for a legal conclusion - that is particularly so with the primary judge's statement that equity will not assist a wrongdoer, which is a short-hand reference to the maxim that "they who come to Equity must come with clean hands" - there must be an immediate and necessary connection between the conduct said to make the claimant's hands unclean and the equity claimed - Block 27's asserted equity arose from the previous Crown lessee/sublessor granting consent in breach of fiduciary duty, where Takeshi had known of this breach because it had the same directors - Block 27's conduct said to make its hands unclean was that it sought to rely on a sublease granted by its predecessors in title that did not comply with the Crown lease - in order to obtain the equitable relief it sought, Block 27 had to rely on Takeshi's knowledge that the previous Crown lessee/sublessor was acting in breach of its fiduciary duty by failing to obtain Block 27's consent - but the requirement for Block 27's consent only arose due to the failure by Block 27's predecessors in title to grant a sublease complying with the Crown lease - that is, the interest equity was asked to protect was brought into existence by the failure to comply with the Crown lease - the Court should not grant relief where to do so would legitimise the ongoing breach of the Crown lease - therefore, for reasons different to those of the primary judge, the Court agreed that Block 27 should be denied relief on the basis that it was, in a relevant sense, a wrongdoer.
Block 27 Pty Ltd (I B C)

Poem for Friday

***Ode on Intimations of Immortality from Recollections* of Early Childhood**

By William Wordsworth (1770-1850)

Our birth is but a sleep and a forgetting;
The Soul that rises with us, our life's Star,
Hath had elsewhere its setting
And cometh from afar;
Not in entire forgetfulness,
And not in utter nakedness,
But trailing clouds of glory do we come
From God, who is our home.

From *The Tempest*, Act 4 Scene 1

By William Shakespeare (1564-1616)

Our revels now are ended. These our actors,

As I foretold you, were all spirits and

Are melted into air, into thin air:

And, like the baseless fabric of this vision,

The cloud-capp'd towers, the gorgeous palaces,

The solemn temples, the great globe itself,

Yea, all which it inherit, shall dissolve

And, like this insubstantial pageant faded,

Leave not a rack behind. We are such stuff

As dreams are made on, and our little life

Is rounded with a sleep.

Recitation by **Patricia Conolly**. With seven decades experience as a professional actress in three continents, Patricia Conolly has credits from most of the western world's leading theatrical centres. She has worked extensively in her native Australia, in London's West End, at The Royal Shakespeare Company, on Broadway, off Broadway, and widely in the USA and Canada.

Her professional life includes noted productions with some of the greatest names in English speaking theatre, a partial list would include: Sir Peter Hall, Peter Brook, Sir Laurence Olivier, Dame Maggie Smith, Rex Harrison, Dame Judi Dench, Tennessee Williams, Lauren Bacall, Rosemary Harris, Tony Randall, Marthe Keller, Wal Cherry, Alan Seymour, and Michael Blakemore.

She has played some 16 Shakespearean leading roles, including both Merry Wives, both Viola and Olivia, Regan (with Sir Peter Ustinov as Lear), and The Fool (with Hal Holbrook as Lear), a partial list of other classical work includes: various works of Moliere, Sheridan, Congreve, Farquar, Ibsen, and Shaw, as well as roles such as, Jocasta in Oedipus, The Princess of France in Love's Labour's Lost, and Yelena in Uncle Vanya (directed by Sir Tyrone Guthrie), not to mention three Blanche du Bois and one Stella in A Streetcar Named Desire.

Patricia has also made a significant contribution as a guest speaker, teacher and director, she has taught at The Julliard School of the Arts, Boston University, Florida Atlantic University, The North Carolina School of the Arts, University of Southern California, University of San Diego, and been a guest speaker at NIDA, and the Delaware MFA program.

The second reading today is by **Colin McPhillamy**, actor, and Alan's cousin. 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'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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