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Benchmark

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A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (One Minute Read)

Prestige Form Group NSW Pty Ltd v QBE European Operations PLC (FCA) - insurance exclusion clause construed in accordance with its plain meaning (I B C)

Carpenter & Anor v Morris & Anor (NSWCA) - a claim for moneys had and received for half the proceeds of former partnership operations succeeded (B)

Van Haren v Van Ryn (NSWSC) - plaintiff had established sexual abuse by the defendant, and the Court assessed general damages (including aggravated and exemplary damages) and other damages (I)

Pang v Cao (NSWSC) - Court refused to extend caveat where the caveator had only a weak case of being entitled to remain in possession (I B C)

Bushfire Survivors for Climate Action Incorporated (INC 1901160) v Narrabri Coal Operations Pty Ltd (ACN 129850139) (NSWLEC) - application for judicial review by a climate change activist group of a decision to grant development consent to the expansion of a coal mine dismissed (I B C)

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Summaries With Link (Five Minute Read)

Prestige Form Group NSW Pty Ltd v QBE European Operations PLC [2023] FCA 749
Federal Court of Australia
Jackman J
Insurance - Prestige carried on the business of formwork contracting, meaning the erection of formwork into which concrete is poured - it entered into a subcontract for the provision of formwork and associated works in connection with a project at Oran Park - Prestige completed the formwork for the first basement level above the bottom level - that formwork later failed while concrete was being poured into it by another subcontractor, causing the concrete slab to collapse onto the ground below - the head contractor foreshadowed a claim against Prestige - Prestige sought indemnity under its policy with QBE in respect of any liability it might have to the head contractor arising out of the collapse - QBE declined indemnity, including on the ground that any liability Prestige might have was excluded by a contract works exclusion, which excluded liability "liability in respect of damage to property which consists of or forms part of "the Contract Works" - "contract works" was defined as "engineering, construction, electrical or mechanical, installation or erection works, including formwork, hoardings, temporary buildings or works, scaffolding, principal supplied or free issue materials, materials for incorporation in the works and additions, alterations, refurbishing or overhaul of pre-existing property" - the parties identified a separate question for the Court, namely "[a]re the works identified in the definition of Contract Works for the purposes of the Contract Works exclusion limited to those owned or in the possession of the insured which makes the claim under the Policy?" - held: commercial contracts should be construed with reference to the commercial purpose sought to be achieved by their terms and should make commercial sense and avoid making commercial nonsense or working commercial inconvenience - the insuring clause and any exclusion clause must be read together in a harmonious way so that due effect is given to both, and the right conferred by the former is not negated or rendered nugatory by the construction adopted for the latter - an exclusion clause is to be construed according to its ordinary and natural meaning, read in the light of the contract as a whole - the *contra proferentem* rule is to be applied only as a last resort after the orthodox process of construction has failed to resolve an ambiguity - the ordinary and natural meaning of the language used in the Contract Works exclusion did not favour Prestige's narrow construction wherein its application was confined to the insured's own Contract Works or those within its possession - there was nothing unbusinesslike (or absurd) in adopting the ordinary and natural meaning of the exclusion - question answered "no".
Prestige Form Group NSW Pty Ltd (I B C)

Carpenter & Anor v Morris & Anor [2023] NSWCA 154
Court of Appeal of New South Wales
Bell CJ, White JA, & Simpson AJA
Restitution - Tastex Pty Ltd entered into a partnership agreement with Central West Granite Pty Ltd in 1996 for the purposes of conducting a quarrying business - Carpenter controlled Tastex, and Morris controlled Central West Granite - the quarry in question was known as the Grandee

Quarry, and contained a rock known as gabbro, which, when cut and polished, is a shiny black rock used for purposes such as making kitchen benches, headstones, decorating public buildings, and landscaping - the partnership was dissolved around 2003 and agreements were entered into - the quarry was on two lots, and, under a mineral lease granted by the owners of the lots, the leasehold interest in the minerals in both lots was owned by Morris - notwithstanding the dissolution of the partnership, Tastex continued to mine the quarry until 2014 - Carpenter and Tastex brought claims relating to the affairs of the partnership, and the mining of the quarry from 2003 to 2014 - the primary judge held it was impossible to identify what materials had been stockpiled during the operation of the partnership, let alone to identify and value any saleable material that may be contained in it, and that there would be no purpose in ordering the taking of accounts - Carpenter and Tastex appealed on two issues: whether they could maintain a claim against Morris for moneys had and received for half of the moneys received from the sale of gabbro during the partnership period, and whether Carpenter and Tastex could recover damages for Morris repudiating the 2003 agreements for Tastex to quarry the gabbro after the partnership was terminated by not obtaining the requisite authorities for the venture to continue - held: *prima facie*, Morris was liable to restore the moneys by an action for money had and received - Morris did not plead a change of position defence or a limitation defence - the primary judge had erred to the extent that she rejected this claim on the basis that it was, as articulated, a claim for knowing receipt of moneys paid by a fiduciary in breach of fiduciary duty - the primary judge did not find that Morris had no honest belief he was entitled to the moneys - subject to defences such as change of position or bona fide purchase for value without notice, a common money count for moneys had and received may be brought and sustained against a defendant who never had any entitlement to receive money not given as a gift - neither mistake nor total failure of consideration is required to be established, although they may separately sustain a claim for restitution - the primary judge had not erred in finding that there was no implied term that Morris would obtain the relevant approvals - appeal allowed in part.
View Decision (B)

Van Haren v Van Ryn [2023] NSWSC 776
Supreme Court of New South Wales
Chen J
Assault and battery - the plaintiff brought proceedings, alleging he was sexually abused and sexually assaulted by the defendant in the period 2010 to 2012 - the defendant did not participate in the proceedings - held: given the non-participation by the defendant, the position was analogous to the approach of the Court when determining a claim where a party is absent - that is, the Court must investigate the merits of the matter and, further, the plaintiff must still prove his case on the balance of probabilities in the usual way - further, given what is alleged, namely, allegations of sexual assault against a minor, it was relevant to take into account "the gravity of the matters alleged" pursuant to s140(2)(c) of the *Evidence Act 1995* (NSW) - the Court accepted the plaintiff's evidence unreservedly - although the plaintiff sued in trespass, current tort law taxonomy suggests that a cause of action in trespass, as distinct from assault

and battery, has fallen away and developed into the nominate torts of assault, battery, and false imprisonment - assault consists in intentionally creating in another person an apprehension of imminent harmful or offensive conduct - battery involves the actual infliction of unlawful force on another - in this case, each incident of abuse involved a battery and all but certainly involved an assault in the moments leading up to the battery - it was therefore impossible to sensibly separate the respective parts of each of the events of abuse for the purposes of assessing damages in relation to each cause of action (that is, assault and battery) where, as here, the claim was based (and only based) on psychiatric injury caused by such conduct - the plaintiff had recognised and accepted these difficulties, and proceeded in submissions on the basis that the sole cause of action relied upon was battery - battery was clearly made out on the findings the Court had made in connection with each of the specific events of abuse - the Court accepted the evidence of the plaintiff's expert psychiatrist that the plaintiff was suffering from chronic post-traumatic stress disorder and a major depressive disorder caused by the sexual abuse - the Court assessed general damages at $500,000 plus interest (which included an amount for aggravated damages and an amount for exemplary damages), damages for past economic loss of $255,000 plus interest, damages for future economic loss of $506,260, damages for loss of superannuation entitlements as $55,688.60 plus interest, and damages for out of pocket expenses of $10,450 - aggravated damages were included as the defendant's conduct was conscious wrongdoing in contumelious disregard of the plaintiff's rights - exemplary damages were included to fulfil the objectives of punishment, deterrence, and condemnation, and for the disgraceful and reprehensible sexual abuse of a child.
View Decision (I)

Pang v Cao [2023] NSWSC 773
Supreme Court of New South Wales
Parker J
Caveats - Pang was a Chinese citizen who was in Australia under a visa that allowed her to be employed full time - Cao was an Australian citizen - both Pang and Cao worked at a real estate agency - Cao was Pang's supervisor, and they also had a close personal relationship before falling out - the developers of the Uno development at Green Square retained the real estate agency to market the units in that development - Pang claimed that Cao suggested she buy a unit as an investment - due to Pang's visa status, Cao proposed that he would acquire the unit with Pang paying for it - Cao took out a loan and acquired the unit subject to a mortgage, and Pang paid the deposit - Cao ultimately entered into a contract to sell the unit - Pang lodged a caveat over the unit, reciting that Cao held it on constructive trust for her - Cao served a lapsing notice - Pang applied to the Court for an extension of a caveat, and Cao made a cross application to have the caveat compulsorily withdrawn - held: in deciding whether to extend the caveat the Court should follow the well-established principle that the test is substantially the same as that for an interlocutory injunction - first, the applicant must determine that the caveat has or may have substance, with the phrase "may have substance" encompassing the concept of a seriously arguable case - second, the Court will have regard to considerations of the balance of convenience and prejudice, and, finally, to other discretionary considerations - Pang

had put her case for the recognition of a trust as a resulting trust, or, alternatively, a constructive trust, either on the basis of failed joint endeavour (along the principles of *Muschinski v Dodds* (1985) 160 CLR 583) or as a common intention constructive trust - Pang's counsel also indicated Pang would be seeking orders requiring Cao to account as trustee - Cao did not dispute that there was a *prima facie* case that he purchased the property on behalf of, and effectively as trustee for, Pang - however, he emphasised that Pang was obliged to discharge the mortgage before she could claim to be the beneficial owner of the property, and that no obligation arose to transfer ownership until Pang tendered the amount outstanding under the mortgage, or at least produced an unconditional offer from a financier to lend her sufficient funds to discharge the mortgage - to have the caveat extended, Pang needed to be able to establish a *prima facie* case that she would ultimately be entitled to remain in possession of the unit - it was not enough for Pang to allege that the property was being sold at an undervalue; she needed to establish a *prima facie* case that Cao was obliged to retain the property for her, and had therefore not been entitled to sell the unit at all - the Court not need to make a final decision on whether Cao was guilty of breach of trust in selling when he did; it was sufficient for the Court to say that, on the evidence, the case for Pang being entitled to remain in possession was at best a weak one - Pang's delay was also a significant factor in the application - regarding the balance of convenience, the purchaser's rights as an innocent third party were of much greater significance than the asserted prejudice to Pang - extension of caveat refused, and caveat compulsorily withdrawn - proceedings transferred to District Court for the taking of accounts.
View Decision (I B C)

Bushfire Survivors for Climate Action Incorporated (INC 1901160) v Narrabri Coal Operations Pty Ltd (ACN 129850139) [2023] NSWLEC 69
Land and Environment Court of New South Wales
Duggan J
Planning law - Narrabri Coal Operations Pty Ltd is a wholly owned subsidiary of Whitehaven Coal Limited and operates the Narrabri Underground Coal Mine on behalf of the Narrabri Mine Joint Venture - this mine is a major coal mining operation situated in the Gunnedah Coalfield - the Independent Planning Commission of NSW granted development consent, on conditions, to Narrabri Coal for an Extension Project to the Narrabri Underground Mine Extension (Stage 3) Project - Bushfire Survivors for Climate Action Incorporated commenced judicial review proceedings challenging the grant of development consent - the sole basis of the applicant's claim was that the decision was legally unreasonable, relating to both to the process of the making of the decision and the decision itself - the applicant's claim focussed on the issues raised in the determination of the Extension Project relating to the impacts of that project on climate change, in particular (but not exclusively) by emissions of greenhouse gasses - held: where a statute confers upon a decision-maker a discretion, absent some express indication to the contrary, it is intended that such discretion be exercised reasonably - the standard of reasonableness must be ascertained from the scope and purpose of the legislation that confers the decision-making power in question - the constraints upon the power being exercised

pursuant to s4.38(1) of the *Environmental Planning and Assessment Act 1979* (NSW) were to be determined from the scope, purpose and objects of that Act - the power granted by the terms of s4.38 is discretionary in nature, that is, it is for the consent authority to determine the outcome of the exercise of the power - an inference could not be drawn from the Commission's failure to make the express findings that the applicant contended for that the Commission had acted unreasonably, as there was no express or implied requirement to make such findings - the Commission did engage with the scope and potential impact of the greenhouse gas emission in a manner consistent with the exercise of power to determine the Extension Project as required by s4.38 - the findings made by the Commissioner as to the public interest were not unreasonable in the sense that in making the decision the Commission exceeded the scope of its power - it was not legally unreasonable for the Commissioner to make the decision in light of the evidence of harm caused by climate change and the acceptance by the Commission that a certain amount of greenhouse gasses which would be produced by the burning of the coal extracted as a consequence of the Extension Project would contribute to anthropogenic climate change - the decision was within the bounds of the Commission's decision-making power - application for judicial review dismissed.
View Decision (I B C)

Poem for Friday

If We Must Die

By: Claude McKay (1890-1948)

If we must die, let it not be like hogs
Hunted and penned in an inglorious spot,
While round us bark the mad and hungry dogs,
Making their mock at our accursèd lot.
If we must die, O let us nobly die,
So that our precious blood may not be shed
In vain; then even the monsters we defy
Shall be constrained to honor us though dead!
O kinsmen! we must meet the common foe!
Though far outnumbered let us show us brave,
And for their thousand blows deal one death-blow!
What though before us lies the open grave?
Like men we'll face the murderous, cowardly pack,
Pressed to the wall, dying, but fighting back!

Festus Claudius "Claude" McKay, (September 15, 1890 - May 22, 1948) was an American poet, born in Jamaica, West Indies. He was the son of landed farmers, brought up in the Baptist church. From the age of 9 he was sent to live with his brother, a teacher, who advanced Claude's education. McKay wrote poetry from the age of 10. He was an apprentice carpenter. Encouraged to continue his writing, he studied in the USA, from 1912, at Tuskefee University in South Carolina, where he was shocked by segregation and the discrimination he experienced. In early 1919 McKay travelled to London, in 1922 to Russia, and in 1937 to Morocco. He was one of the central writers in the *Harlem Renaissance* M*ovement*, when black music, writing, politics, intellectual thought and art flourished in Harlem. McKay wrote poetry that explored racial pride and black identity in an era of huge discrimination. Alain Lock described the era as "*a spiritual coming of age*". **If We Must Die** was written in response to the riots and lynchings in southern USA after the First World War and was a call to rise up against the oppression and murder of blacks. McKay wrote five novels and four collections of poetry. He died in Chicago, USA in 1948.
https://en.wikipedia.org/wiki/Claude_McKay

Kevin Young, editor of the Library of America Anthology "*African American Poetry: 250 Years of Struggle and Song*" reads Claude McKay's "*If We Must Die*".
https://www.youtube.com/watch?v=ovjB8VIMuvc

Claude McKay, recites his poem "*If We Must Die*".
https://www.youtube.com/watch?v=3nrbwagWcrs

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