



Friday, 9 February 2024

## 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)

**Melbourne Bone and Joint Clinic Pty Ltd v Registrar of Trade Marks** (FCA) - the mark MELBOURNE BONE AND JOINT CLINIC was not to any extent inherently adapted to distinguish the designated services from the services of other persons (I B)

**M. & S. Investments (NSW) Pty Ltd v Affordable Demolitions and Excavations Pty Ltd** (NSWCA) - primary judge had erred in holding that environmental prosecutions were out of time (I B C)

**Clarke v Health Care Complaints Commission (No 2)** (NSWCA) - New South Wales Civil and Administrative Tribunal had not erred by cancelling the appellant's registration as a nurse, where the appellant suffered mental illness but had no insight into her condition (I)

**Katsoulas v Kritikakis; Katsoulas v Apostolatos** (NSWSC) - executors removed, and executors and another required to account for moneys withdrawn from a deceased's bank account during his life in breach of fiduciary duty (I B)

**Hooper v Phipps (No 2)** (NSWDC) - District Court rejected the suggestion that trial by jury in defamation actions is out of date in the modern world (I)

**Chang v Peng** (SASC) - proceedings in the District Court were a matrimonial cause, and the Federal Circuit and Family Court therefore had jurisdiction, even though the District Court

proceedings were commenced first (I B)

## HABEAS CANEM

Peace



# Benchmark

## Summaries With Link (Five Minute Read)

### **Melbourne Bone and Joint Clinic Pty Ltd v Registrar of Trade Marks [2024] FCA 53**

Federal Court of Australia

Moshinsky J

Trade marks - the appellant applied to register MELBOURNE BONE AND JOINT CLINIC as a trade mark in respect of compilation of medical reports and orthopaedic surgery and related services - a delegate of the Registrar of Trade Marks rejected the application as the trade mark was not to any extent inherently adapted to distinguish the designated services from the services of other persons; and the appellant had not used the trade mark before application to such an extent that the trade mark did in fact distinguish the designated services as being those of the appellant - the appellant appealed under s35 of the *Trade Marks Act 1995* (Cth) - held: the appeal was in the Court's original jurisdiction and was conducted as a hearing *de novo* - it was appropriate that the Registrar had played an active role in the proceeding and had been represented by solicitors and counsel, as there was no opponent - the trade mark was not sufficiently inherently adapted to distinguish, such that it is entitled to registration without needing to consider evidence of use or other circumstances under s41(3) or s41(4) of the *Trade Marks Act* - the trade mark was not to any extent inherently adapted to distinguish the designated services from the services of other persons, and it was therefore in the territory of s41(3) rather than s41(4) - the appellant had not used the trade mark before the filing date in respect of the application to such an extent that the trade mark did in fact distinguish the designated services as being those of the appellant for the purposes of s41(3)(b) - the trade mark was not entitled to registration - appeal dismissed.

[Melbourne Bone and Joint Clinic Pty Ltd](#) (I B)

### **M. & S. Investments (NSW) Pty Ltd v Affordable Demolitions and Excavations Pty Ltd [2024] NSWCA 17**

Court of Appeal of New South Wales

Ward P, Mitchelmore JA, & Preston CJ of LEC

Environmental law - the appellant was granted leave to prosecute alleged offences by the respondents committed by alleged unlawful dumping of asbestos waste on the appellant's land - the first primary judge found the proceedings were time-barred - time runs from when evidence of the alleged offences first came to the attention of an "authorised officer" within the meaning of s216 of the *Protection of the Environment Operations Act 1997* (NSW), and the first primary judge found that two Council employees "authorised officers" in that sense - the second primary judge set aside a subpoena the appellant had issued to Optus for phone records, holding that the subpoena was both premature and too broad - the appellant sought leave to appeal against both decision - held: the statutory powers in s378 of the *Local Government Act 1993* (NSW) and s187 of the *Protection of the Environment Operations Act* are mutually exclusive - a delegation of functions to a Council employee under s378 of the *Local Government Act*, by itself, cannot constitute the appointment of that employee as an authorised officer under s187 of the *Protection of the Environment Operations Act*, and vice versa - the nature of each statutory



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power is fundamentally different, as the power in s378 is to delegate authority while the power in s187 is to grant authority - the functions of an authorised officer for the purposes of the *Protection of the Environment Operations Act* can only be exercised by a person appointed as an authorised officer under s187 of the *Protection of the Environment Operations Act* - the Council officers had not been authorised officers, and the appeal against the dismissal of the proceedings for being time barred must succeed - the second primary judge had exercised her discretion regarding the subpoena reasonably, and leave to bring this appeal should be refused and this appeal dismissed.

[View Decision](#) (I B C)

## **Clarke v Health Care Complaints Commission (No 2) [2024] NSWCA 15**

Court of Appeal of New South Wales

White, Mitchelmore, & Kirk JJA

Professional standards - the New South Wales Civil and Administrative Tribunal cancelled the appellant's registration as a nurse pursuant to s149C(1)(a) of the *Health Practitioner Regulation National Law (NSW)* with a non-review period of three years - the Tribunal found that the appellant suffered from a bipolar disorder, psychotic and paranoid personality features, and had no insight into her impairments, in that she denied she suffered from mental illness, had not complied with prescribed mental health treatment regimen, and had failed to attend and complete a performance assessment as required by the Nursing and Midwifery Council - the appellant sought to appeal - held: the Tribunal had not erred in accepting the evidence of the Health Care Complaints Commission - there had been no denial of procedural fairness - the Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice - s149C(7) of the National Law expressly provides that, where the Tribunal cancels a registered health practitioner's registration, the order may also provide that an application for review of the order may not be made until after a specified time - the Tribunal had been entitled to make an order prohibiting her from providing health services for a specified time if it were satisfied that she posed a substantial risk to the health of members of the public - the evidence before the Tribunal amply justified the Tribunal's conclusion that she was not competent to provide teaching services - appeal dismissed.

[View Decision](#) (I)

## **Katsoulas v Kritikakis; Katsoulas v Apostolatos [2024] NSWSC 67**

Supreme Court of New South Wales

Leeming JA

Equity - the son of a deceased commenced proceedings against a friend of the deceased who was a signatory on at least one of the deceased's bank accounts, and against the daughter and son of that friend who were the deceased's executors and who had been attorneys of the deceased under an enduring power of attorney - the deceased had left essentially the entirety of his estate to his son - the son alleged the friend had made unauthorised withdrawals from the deceased's bank accounts during the deceased's life, relying on both breach of contract and

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equity - the son alleged that the friend's children had breached their fiduciary obligations when they had withdrawn money as attorneys, had breached their duties as executors by failing to disclose they had withdrawn that money, and by failing to take the appropriate actions concerning the withdrawals by both the friend and themselves, and the son sought that the grant of probate should be revoked and a new grant issued to him - held: the son had been entitled to give away his money during his lifetime, so long as he was of sound mind, but that was not what had occurred here - the son had failed to make out a contract between the deceased and the friend, due to both an absence of intention to create a legal relationship and an absence of consideration - as to the equitable claim against the friend, the friend had clearly been a fiduciary, and required to act in the deceased's best interest, and not entitled to act self-interestedly or to profit from the exercise of his power - as between principal and agent, the agent is a fiduciary, and speaking generally is required not to place himself or herself in a position of conflict, nor to obtain a profit or benefit from the position, without first obtaining fully informed consent - the friend had not shown that he obtained consent - the friend had not shown that he had been entitled to withdraw the money from the deceased's bank account for the benefit of himself and his children - subject to any applicable discretionary considerations, the friend was liable to account to the estate for those withdrawals - the Court accepted that the friend's children had not acquired money by exercising their powers under the enduring power of attorney - however, they had received the money by reason of the friend's breaches of fiduciary duty, and were required to account to the estate - the friend's children should be removed as executors.

[View Decision](#) (I B)

## **Hooper v Phipps (No 2) [2024] NSWDC 8**

District Court of New South Wales

Gibson DCJ

Defamation - a Willoughby City Council councillor sued Council's media and marketing officer and the Council in defamation, regarding two emails sent by the media and marketing officer to a journalist with the North Shore Times - the plaintiff made an election for jury trial - on the opening day of trial, the plaintiff suffered an atrial fibrillation while giving evidence, and the jury was discharged and the hearing date vacated - the Court set a new trial date, leaving in abeyance the question whether it would be by jury or judge alone - a cardiologist gave evidence that the plaintiff was fit for examination and cross-examination in a jury trial - the defendants applied under s21(1) of the *Defamation Act 2005* (NSW) that the trial proceed without a jury - the plaintiff opposed this - held: s21(1) provides that, unless the court orders otherwise, a plaintiff or defendant in defamation proceedings may elect for the proceedings to be tried by jury - s21(1) gives a general discretionary power to order that a defamation proceeding not be tried by jury, despite the election by a party for a jury trial - the power is discretionary, and is unfettered by the limitations or specific matters in other subsections of s21 - the special rules in the *Defamation Act* concerning jury trials (as opposed to the general principle for civil litigation in NSW) illustrates the legislative recognition of the importance of their role in defamation proceedings - the common law has commensurately recognised the significance of jury trials in

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defamation actions, and the right to elect for a jury is of value and importance - the universal characteristics of jury trials (cost, duration, and unpredictability) are assumed by the availability of the election and are not relevant matters to take into account in the exercise of the discretion - the onus is on an applicant seeking to change the mode of trial to persuade the court to do so and a party who lawfully requisitions a jury is not obliged to explain his or her choice and does not have to justify retention of the jury - the Court rejected a submission from Counsel for the defendants that jury trials in defamation matters were out of date, and had become a cumbersome and inefficient mode of trial, inconsistent with modern case management statutes, when compared to the case management system used in courts such as the Federal Court, as shown by that Court's recent blockbuster defamation cases - application to dispense with the jury dismissed.

[View Decision](#) (I)

## **Chang v Peng [2024] SASC 18**

Court of Appeal of South Australia

Kourakis CJ

Transfer of proceedings - Peng separated from her husband - her mother in law, Chang, had provided the entirety of the purchase price of property at Ulney - Chang commenced proceedings in the District Court, seeking a declaration that Peng held the property on trust for her - Peng then commenced proceedings in the Federal Circuit and Family Court against her husband Chang, seeking an order for the sale of the property and 30% of the net proceeds of sale - Peng applied in the Supreme Court for transfer of the District Court proceedings to the Federal Circuit and Family Court - Chang contended that the Federal Circuit and Family Court had no jurisdiction to determine was beneficially entitled to the property, as she had commenced her proceedings first, and those the proceedings were not a "matrimonial cause" within the meaning of the *Family Law Act 1975* (Cth) - held: the definition of "matrimonial cause" in s4 of the *Family Law Act* contains a number of principal definitions of matrimonial causes - paragraph (f) of the definition extends the definition to any proceedings in relation to concurrent, pending or completed proceedings of a kind referred to in any of paragraphs (a) to (eb) - it was clear the District Court proceedings would have been related to the family law proceedings in the family law proceedings had been commenced first - the question was whether it mattered that the District Court proceedings were commenced first - it was very difficult to see any rational reason for limiting the definition of "matrimonial cause", and therefore the jurisdiction of the Federal Circuit and Family Court, by reference to what will often be the accident of timing in the initiation of proceedings such as these - there was no textual basis for such a result - the District Court proceedings were a matrimonial cause and the Federal Circuit and Family Court therefore had jurisdiction - the interests of justice plainly favoured a single hearing - proceedings transferred.

[Chang](#) (I B)



## Poem for Friday

### Sonnet 104: To me, fair friend, you never can be old

**By:** William Shakespeare (1564-1616)

To me, fair friend, you never can be old,  
For as you were when first your eye I eyed,  
Such seems your beauty still. Three winters cold  
Have from the forests shook three summers' pride,  
Three beauteous springs to yellow autumn turned  
In process of the seasons have I seen,  
Three April perfumes in three hot Junes burned,  
Since first I saw you fresh, which yet are green.  
Ah, yet doth beauty, like a dial-hand,  
Steal from his figure, and no pace perceived;  
So your sweet hue, which methinks still doth stand,  
Hath motion, and mine eye may be deceived:  
For fear of which, hear this, thou age unbred:  
Ere you were born was beauty's summer dead.

Although his exact birth date is not known, **Shakespeare** was baptised in Stratford-upon-Avon on 26 April 1564. His mother's first two children died in infancy. His father was at one time bailiff of Stratford. Shakespeare attended King's New School. Scholars have suggested that Shakespeare had been a schoolteacher a law clerk and a soldier, although Shakespeare became known as an author, poet, playwright and actor. Records are sparse concerning some periods of his life. He married Anne Hathaway when he was 18 years of age, and they had a daughter and twins two years later in 1585. His work as an actor was affected by an outbreak of the plague in 1592 when all theatres were closed to prevent the spread of infection. **Sonnet 14**, is written in the form of Shakespeare's other sonnet - 14 lines long, divided into quatrains, with the second and fourth lines of each quatrain rhyming. William Shakespeare died on 23 April 1616, on or about the date of his 52nd birthday.

**Patrick Stewart** reads Sonnet 104 by William Shakespeare

<https://www.youtube.com/watch?v=itC4NsqpDLO>

**Jessica Bell**, actress recites Shakespeare's Sonnet 104

<https://www.youtube.com/watch?v=pL1VGgZMMHU>

**Sir John Gielgud** reads Sonnet 104



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