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Benchmark

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Daily Civil Law

Today's Benchmark is published in memory of our friend and colleague, Catherine Vidler (1973-2023)

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (One Minute Read)

Australian Securities and Investments Commission v Kaur (FCA) - defendants had carried on on a financial services business without an AFSL, and operated an unregistered managed investment scheme in breach of s601ED of the *Corporations Act 2001* (Cth) (I B)

Seven Network (Operations) Limited v 7-Eleven Inc (FCA) - Seven had not used the mark 7NOW in the relevant period, and the discretion to let the mark remain on the register should not be exercised in Seven's favour (B I)

David Robert Raymond Napoli v Joan Mary Napoli and Carole Anne Wood as executors and trustees for the estate of the late Mario Robert Napoli (NSWSC) - the deceased had owned a property beneficially, notwithstanding an acknowledgment in his will that he held the property on trust (B I)

Medical Device Technologies Pty Ltd v Health Administration Corporation (NSWSC) - ventilators supplied to NSW Government during covid had not been fit for purpose (I B)

Re Kralcopic Pty Ltd (Deregistered) (VSC) - State had an interest in disclaimed property of a failed mining company under the doctrine of escheat, and vesting orders under the *Corporations*

Act 2001 (Cth) should be made (I B C)

HABEAS CANEM

Beach break

Summaries With Link (Five Minute Read)

Australian Securities and Investments Commission v Kaur [2023] FCA 599
Federal Court of Australia
Jackson J
Financial services - the first defendant gave advice to potential investors to set up their own self-managed superannuation funds and to roll funds from existing superannuation accounts and other sources into those SMSFs - she also advised investors to use those funds to invest with a company she controlled, the second defendant, where funds were pooled with the funds of other investors and invested in property development - the investors were to be paid a fixed return on the funds they invested, under instruments characterised as loan agreements, with the fixed return characterised as interest - investors invested over $10million in this way - some investors had not been repaid and their capital was likely lost - the defendants had failed to keep proper records - the first defendant used investor funds for her own benefit and the benefit of her family - the first two defendants also received over $1million in fees for the advice and services they provided - ASIC sued, contending that, in giving the advice and operating the scheme, the first two defendants were carrying on a financial services business without the necessary Australian Financial Services Licence, and were operating an unregistered managed investment scheme in breach of s601ED of the *Corporations Act 2001* (Cth) - ASIC and the defendants agreed on the appropriate orders - held: even though the parties had reached agreement, the Court must be satisfied that the proposed orders were within power and appropriate - once so satisfied, the Court should exercise a degree of restraint when scrutinising the proposed settlement terms, particularly where all parties are legally represented - the Court is entitled to treat the consent of the defendants as an admission of all facts necessary or appropriate to the granting of the agreed relief - the Court was satisfied the first two defendants had operated a managed investment scheme and carried on a financial services business - there was no prospect the scheme could be regularised and carried on lawfully and profitably - the best prospect for any return to investors is to wind it up and appoint liquidators of the second defendant and receivers and managers of relevant property of the defendants - the first defendant should be disqualified from managing corporations for life, and another defendant should be disqualified for 15 years - the first defendant should be permanently restrained from carrying on a financial services business in Australia, and from operating an unregistered managed investment scheme in contravention of s601ED(5) - while the latter part of that restraint would prohibit conduct that is already unlawful, it was appropriate to add the possible sanction of contempt of court - it was appropriate to make asset preservation orders to give the liquidators and receivers time to investigate what may have become of investor funds, and whether recovery action should be taken - orders made.
Australian Securities and Investments Commission (I B)

Seven Network (Operations) Limited v 7-Eleven Inc [2023] FCA 608
Federal Court of Australia
Thawley J

Trade marks - Seven registered the domain name 7now.com.au in 2011 - for a period, the 7now.com.au domain redirected users to the 7plus.com.au domain, and for a later period, it directed users to the 7NOW website - Seven had owned the trade mark 7NOW since 2013 - 7-Eleven filed a non-use application regarding this mark in 2019 - 7-Eleven then applied to register the mark 7NOW (2077255) and a similar figurative mark - a delegate of the Registrar cited Seven's 7NOW Mark as a possible basis to refuse registration - the Registrar then decided that Seven had not used the 7NOW Mark as a trade mark in respect of any of the specified goods or services during the relevant non-use period, and that the discretion under s101 of the *Trade Marks Act 1995* (Cth) to allow the mark to remain on the register should not be exercised in Seven's favour in respect of any goods or services - Seven appealed to the Federal Court - held: although described as an appeal, this was a hearing *de novo* in which the Court approaches the matter for the first time exercising the judicial power of the Commonwealth, not in order to correct error in an executive decision, but to deal with a controversy for the first time - Seven did not assert any use of the 7NOW Mark during the non-use period beyond its use in the domain name and on the 7NOW website - Seven bore the onus of rebutting the allegation made by 7-Eleven under s92(4)(b) of the Act, which required establishing on the balance of probabilities that Seven had used the 7NOW mark in good faith in Australia during the non-use period - the use as a trade mark must be "real commercial use" or "ordinary and genuine use" and not "some fictitious or colourable use" - Seven had not used 7NOW as a trade mark, either when 7now.com.au redirected users to 7plus.com.au, or when it redirected users to the 7NOW website - the Court therefore had to decide whether to exercise the discretion under s101 to decide that the 7NOW mark should not be removed from the register despite its non-use - the discretion is broad and unfettered in the sense that there are no express limits on it, and it is limited only by the subject-matter, scope, and purpose of the legislation and, in particular, Part 9 of the Act - different traders want to use marks with the digit 7 - Seven has a range of 7-formative marks, and its reputation in those other marks does not mean that the discretion to refuse to remove a 7-formative mark in relation to a particular use should be exercised where another trader wishes to use the mark in relation to that use and Seven has not used it for that use - appeal dismissed.
Seven Network (Operations) Limited (B I)

David Robert Raymond Napoli v Joan Mary Napoli and Carole Anne Wood as executors and trustees for the estate of the late Mario Robert Napoli [2023] NSWSC 606
Supreme Court of New South Wales
Peden J
Equity - the deceased had been diagnosed with a terminal illness - the day before he died, he instructed his sister, one of his executrices, to urgently prepare a new will - under the new will, a property at MacMasters Beach would be held on testamentary trust for the deceased's three children - the will was prepared, but the deceased lost consciousness and died before he could execute it - probate was granted in respect of the last executed will of the deceased - that will provided that the deceased acknowledged that the MacMasters Beach property was held on trust for the deceased's mother, who was still alive, on the basis the mother had provided the

purchase price - the children commenced proceedings, seeking a declaration that the deceased had owned the MacMasters Beach property legally and beneficially from its purchase to his death, and a declaration that the mother and no interest in the property - the executors and the mother were defendants, and supported the children's application - held: the question was whether the acknowledgement in the will was sufficient, viewed alone or with other evidence, to demonstrate that the deceased held the property on trust for his mother - on the evidence, the mother had not provided the purchase price for the property, notwithstanding what was recited in the will - the deceased had been a competent and experienced solicitor, and so the non-existence of any written document or trust deed over the property told against him having declared any trust during his life - the acknowledgment in the will could not itself be a declaration of trust as the words did not convey any immediately operative disposition of an interest in property - a declaration of trust made without consideration and intended to operate at a future time is ineffective - the Court accepted that the deceased had owned the property beneficially at all relevant times - in any event, the affidavit the mother had sworn in the current proceedings would have operated as a disclaimer of the property - there is no evidence of any relevant person resisting the declarations sought - it was appropriate to make the orders sought. View Decision (B I)

Medical Device Technologies Pty Ltd v Health Administration Corporation [2023] NSWSC 602

Supreme Court of New South Wales

Stevenson J

Consumer law - in 2020, in response to the covid pandemic, the NSW Government, through the Health Administration Corporation, entered into two agreements with the plaintiff to purchase a total of 348 "Shangrila 510S Integrated Respirator" ventilators for a total of $20.79 million, being around $60,000 each - the ventilators were manufactured in China and were to be imported into Australia by the plaintiff - the Health Administration Corporation is a corporation established pursuant to the *Health Administration Act 1982* (NSW), and the relevant dealings were between the plaintiff and an administrative unit of the Health Administration Corporation known as HealthShare NSW - HealthShare paid half the purchase price in two instalments - the plaintiff caused the ventilators to be delivered - HealthShare contended that testing revealed the ventilators did not meet basic performance parameters, and that they were clinically useless - HealthShare purported to reject the ventilators and terminate the agreements, and demanded that the plaintiff refund the amount paid - the plaintiff sued, seeking to be paid the remaining half of the purchase price - HealthShare contended it had been entitled to terminate the agreements and was entitled to a refund of the money already paid, based on breach of the terms contained in HealthShare's standard "Purchase Order Terms and Conditions"; breach of the conditions of correspondence with description and fitness for purpose implied into the agreements by ss18 and 19 of the *Sale of Goods Act 1923* (NSW); and the plaintiff's misleading or deceptive conduct contrary to s18 of the *Australian Consumer Law*, principally arising from representations said to have been made by in brochures and a user manual - held: HealthShare had not established that its standard Purchase Order Terms and Conditions had incorporated

into the agreements - HealthShare had not established that the transaction was a sale by description within the meaning of s18 of the *Sale of Goods Act* - HealthShare had established that the ventilators were not fit for purpose within the meaning of s19 of the *Sale of Goods Act* - HealthShare had also established that, to a limited extent, the plaintiff had engaged in misleading or deceptive conduct within the meaning of s18 of the *Australian Consumer Law* - a representation expressly made in the manual that the ventilators were capable of delivering a fraction of inspired oxygen of between 40%-100% with ±20% accuracy was misleading and deceptive, and it was likely that a relevant decision maker had relied on this representation - the Court understood that the plaintiff accepted that it would follow from the Court's conclusion that the ventilators were not fit for purpose that it must now return the moneys paid - parties to be heard on the orders to be made.
View Decision (I B)

Re Kralcopic Pty Ltd (Deregistered) [2023] VSC 306
Supreme Court of Victoria
Gardiner AsJ
Escheat - Kralcopic formerly held mining licenses over three mining sites in Victoria - a delegate of the Minister for Energy and Resources refused to renew Kralcopic's mining licenses pursuant to s31(2)(f) of the *Mineral Resources (Sustainable Development) Act 1990* (Vic) - the delegate was not satisfied that Kralcopic was likely to be able to finance the proposed work and rehabilitation of the land under the licences as required by s15(6)(d) of the Act - an application for judicial review of this decision was dismissed - Kralcopic was ordered to be wound up in insolvency on the application of the Minister - the liquidators disclaimed Kralcopic's interest as registered proprietor of 12 parcels of land at Bendigo as onerous property pursuant to s568(1) of the *Corporations Act 2001* (Cth) - Kralcopic was ultimately deregistered by operation of s509 of the *Corporations Act* - Kralcopic remained the registered proprietor of the parcels of land on the Victorian Register of Land - the State of Victoria applied for orders pursuant to s568F of the *Corporations Act* that the estates in fee simple of the 12 parcels of land vest in the State - held: the legal principles applying when real property is disclaimed under Division 7A of the *Corporations Act* have been described as "clear as mud" - in the circumstances of this case, it seemed the parcels vested in the Crown in right of the State of Victoria by operation of the doctrine of escheat - it is said that the only remnants of this ancient feudal doctrine now exist in the context of disclaimers of onerous property under the *Corporations Act* and the *Bankruptcy Act 1966* (Cth) - there is tension between the doctrine of escheat, which relies on a feudal concept of tenure, and the modern statutory basis for a registered proprietor's interest in real property - it was unnecessary to resolve any conceptual difficulties in this case, because the uncertainty concerning property interests in disclaimed land could be addressed by the Court ordering that disclaimed land vest pursuant to s568F of the *Corporations Act* - this was a clear case in which the parcels should vest in the State so as to facilitate the process of the titles to the parcels being registered in the name of the State - the State had a clear interest in the parcels by operation of the doctrine of escheat - there should therefore be a vesting order under the *Corporations Act* to enable the State to make application pursuant to s59 of the *Transfer of*

land Act 1958 (Vic) to become the registered proprietor - until the State becomes the registered proprietor, the interest in the parcels will not vest at law, only in equity - vesting orders made. Re Kralcopic Pty Ltd (I B C)

Poem for Friday

A selection of poems

By: Murasaki Shikibu (c.978-c.1014)

My place in the world:
why should it bring me grief?
mountain cherry
blossom in my sight,
were it ever so…

***

If I were to vanish away,
would you come
seeking my name
even unto
the grave?

***

As life flows on,
who will ever read it--
this keepsake to her
whose memory
will never die?

Murasaki Shikibu, (possibly born Fuijwara No Kaoriko), born c.978, in Kyoto, Japan, during the Heian Period. She is believed to have lived at court after the death of her husband, as an imperial lady in waiting to Empress Shoshi, who she entertained with her poetry and stories. Murasaki Shikibu was fluent in the Chinese classics. She wrote The *Tale of Genji* between 1000 and 1012, considered to be the world's first full novel. *Tale of Genji* is considered the greatest work of Japanese literature and has inspired art and theatre. She also wrote *The Diary of Lady Murasaki*. Her work of 128 poems Poetic Memories, considered generally biographical have been passed down over the centuries. She wrote poetry in the waka form, which preceded the Japanese form of haiku. Waka form is 5 lines with the sounds or syllables in the pattern by line of 5, 7, 5, 7, 7. The haiku pattern by comparison is three lines of 5, 7, 5 syllables or sounds. Murasaki Shikibu died between about 1014 and 1031.
https://en.wikipedia.org/wiki/Murasaki_Shikibu

Listen to **The Tale of Genji**, translated by Suematsu Kencho (1855-1920), and read by Moira Fogarty, over 9 hours, a LibriVox Audiobook, which is in the public domain https://www.youtube.com/watch?v=NR58kLrp88o

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