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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)

Shun Sheng Pty Ltd v Lei (No 2) (NSWCA) - Court of Appeal upheld decision of primary judge regarding dissolution of a partnership that had run a brothel (I B)

Wilson v Wright; Wilson v Wright (NSWSC) - small provisions made from the estate of a deceased to two stepchildren from whom he had been estranged after one of them made allegations of childhood sexual abuse against the deceased, and he had been charged and found not guilty (B I)

He Run Pty Ltd v LPY Investments Pty Ltd (VSC) - Supreme Court transferred proceedings to the Federal Circuit and Family Court where related proceedings were already on foot (I B)

Alliance Building and Construction Pty Ltd v Veesaunt Property Syndicate 1 Pty Ltd (QCA) - a notice issued by the Superintendent under a building contract had waived compliance with conditions precedent on behalf of the principal (I B C)

Queensland Racing Integrity Commission v Endresz; Racing Queensland Board v Endresz (QCA) - stewards who conducted an inquiry hearing charges against a trainer that led to a horse being disqualified should have also afforded procedural fairness to the horse's owners (I B)

HABEAS CANEM

In the BenchTV studio, directing my Filmographer

Summaries With Link (Five Minute Read)

Shun Sheng Pty Ltd v Lei (No 2) [2024] NSWCA 105
Court of Appeal of New South Wales
Leeming & Payne JJA, & Griffiths AJA
Partnership - two Chinese-Australian women, Wei and Lei, were in partnership, operating a brothel in Guildford - in 2008, they executed a business partnership agreement, and a further agreement, under which a company owned and controlled by Wie leased the business premises to the partnership - the lease was stated to be for 25 years and was never registered - the relationship between the partners broke down in 2021, with Wei alleging Lei had misappropriated the takings of the business to feed her gambling habit - Wei set up a new company Shun Sheng, which she owned 75%/25% with a new business partner - Shun Sheng took over occupation of the premises and the operation of the business - Shun Sheng, the landlord company, and Wei commenced proceedings against Lei and her husband - Wei and her husband cross-claimed - the main disputes were the date of termination of the partnership and which party or parties were liable to account - the primary judge ordered that the partnership be wound up and that a receiver be appointed on the basis that the partnership was dissolved on a particular date (see Benchmark 5 October 2023) - Wei and her companies sought leave to appeal - held: leave was required because the primary judge had made no formal orders were made separating the issues that he had decided in the primary judgment and were now sought to be appealed from the balance of issues arising on the pleadings, and so the primary judgment was is interlocutory for the purposes of s101(2)(e) of the *Supreme Court Act 1970* (NSW) - in cases such as this, the most powerful factor telling for or against a grant of leave is the prospects of the underlying appeal - no basis had been established to challenge the ultimate finding that Wei had not established at first instance that the partnership had been brought to an end on the date claimed by her - nothing in the primary judgment amounted to a finding that certain payments were an advance to Lei's husband against Lei's entitlement from the partnership - the primary judge had been correct to reject a palpably improbable contention that Lei's husband have given an oral guarantee of Lei's obligations - no error had been shown in the finding of the primary judge that Wei failed to establish that Lei and her husband agreed that Lei's liability was at least $1.1 million, which they would pay in consideration of being given time to sell a property - it is not sufficient to identify one or more parts of the evidence of a witness who has been disbelieved generally, upon which the witness was not cross-examined, label those parts as "uncontested testimony", and thereby supply a foundation for a review of demeanour-based findings - leave to appeal granted but appeal dismissed.
View Decision (I B)

Wilson v Wright; Wilson v Wright [2024] NSWSC 519
Supreme Court of New South Wales
Hmelnitsky J
Family provision - a deceased had been the plaintiffs’ stepfather, having been an a long-term

relationship with their mother - the plaintiffs were sister and brother - in 2019, the sister had made allegations of childhood sexual abuse against the deceased, who had been arrested, charged, and found not guilty at trial - there had then been a cessation of contact between the deceased and the plaintiffs and their mother until the deceased's death in 2022 - the deceased left a will leaving the whole of his estate to his sister and naming her his executor, and he had told a friend that he wanted this to occur because she had been so supportive of him during his trial - the sister and brother made applications for provision out of the deceased's estate under s59(1)(b) of the *Succession Act 2006* (NSW) - held: the distributable estate was about $1million - the defendants were eligible persons to apply for family provision pursuant to s57(e) of the *Succession Act*, and therefore had to establish that there were factors warranting the making of an application for provision - this requirement is ordinarily taken to mean that there are circumstances which, when added to the facts that make a plaintiff an eligible person, make that plaintiff a natural object of testamentary recognition - there were such factors in this case, as the deceased had been a father figure to each of the plaintiffs, who had lived with him, their mother, and another brother for virtually their entire childhood - this was not a case in which there is the spectre of untested allegations of historical sexual abuse - an order for family provision does not include an element of reparation or redress for the parent having failed to fulfill their legal or moral duty to be a good parent - the criminal charges and the trial meant that the relationship that had previously existed between the deceased and the plaintiffs was completely at an end by the time the deceased died, and there was never a prospect that either plaintiff would ever again view the deceased as anything like a father figure - the question was whether the community would expect a person in the deceased's position in 2022 to continue to provide for the maintenance of the plaintiffs - there was real doubt about this - the deceased had also already done more than what society would ordinarily expect by way of maintenance for the sister plaintiff during his lifetime, as she had continued to live in his home, together with their own dependents, for many years after reaching adulthood - it was appropriate to have regard to testamentary intention, which in this case was fully considered and well founded - however, the sheer weight of the historical connection between the plaintiffs and the deceased, and the fact that the Court was unable to allocate any blame for the estrangement, meant that both plaintiffs were entitled to a small amount of provision from the deceased's estate - sister plaintiff should receive $50,000 and the brother plaintiff $40,000.
View Decision (B I)

He Run Pty Ltd v LPY Investments Pty Ltd [2024] VSC 223
Supreme Court of Victoria
Waller J
Transfer of proceedings - Yang and Yun were former spouses who, during the course of their marriage, operated an extensive property development business - they set up numerous companies for the purposes of managing their business, and the directorships and shareholdings of these corporate entities were changed many times over the course of the marriage, and the ownership of some of these entities remains in dispute - Yang applied in Division 1 of the Federal Circuit and Family Court under s79A of the *Family Law Act 1975* (Cth)

to set aside final orders made by the Registrar for property settlement between the parties - Yun caused two of his companies to commence proceedings in the Victorian Supreme Court against two of Yang's companies to recover a management fee and a loan - one of Yang's companies cross-claimed against Yun, claiming that he had breached his director's duties when he was a director of the company by causing it to make part payments of the management fee and to enter a deed in relation to the management fee - the value of the parties' interests in the four parties to the Supreme Court action was an issue in the Federal Circuit and Family Court action - Yang's companies sought an order that the Supreme Court proceeding be transferred to the Federal Circuit and Family Court pursuant to s5(1) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth), alternatively, pursuant to s5(1) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Vic) - held: there was greater scope for transfer of a proceeding under the Commonwealth Act, as it required transfer in a wider range of circumstances - there was substantial authority that an applicant for transfer of a proceeding may rely on either the Victorian Act or the Commonwealth Act - the Court was satisfied that the Supreme Court proceeding was related to the Federal Circuit and Family Court proceeding - it would more efficient that all evidence in respect of the disputed transactions involving the companies be given at one time before the same judge - as the Federal Circuit and Family Court was already seized of the dispute between Yang and Yun concerning their joint and separate interests in various companies, it was appropriate that that Court deal also with the claims raised in the Supreme Court proceedings which would directly affect the value of those companies - order for transfer made.
He Run Pty Ltd (I B)

Alliance Building and Construction Pty Ltd v Veesaunt Property Syndicate 1 Pty Ltd [2024] QCA 75
Court of Appeal of Queensland
Mullins P, Bond, & Dalton JJA
Contracts - Veesaunt and Alliance entered into a contract under which a principal engaged a contractor to carry out and complete the design and construction of residential townhouses on the Gold Coast - the parties' rights and obligations were subject to the satisfaction or waiver of conditions precedent - not all of the conditions precedent had been satisfied by the date provided under the contract, in particular the contractor had not provided a bank guarantee and evidence of insurances - the principal contended it had waived the requirement for those conditions precedent to be satisfied - the principal commenced proceedings in the Supreme Court - the primary judge made the declaration sought by the principal that the contract remained on foot and was binding on the parties - the contractor appealed - held: the contract should not be construed as providing for true automatic termination in the event of the conditions precedent not being satisfied or waived by the nominated date - the better view in this case was that, if the conditions precedent were not satisfied or waived by the nominated date, the contract became voidable, not automatically terminated - under the form of contract used, the Superintendent had two roles: (1) agent of the principal, with authorisation to give directions to the contractor; and (2) independent certifier with the role of making objective

assessments which could affect the rights and liabilities of both parties under the contract - this dual role is not uncommon in building and construction contracts - the Court upheld the primary judge's decision an different grounds set out in a notice of contention filed by the principal - rather than finding that the contract was on foot because, on its proper construction, it provided that the contractor could not rely on its own failure to provide a bank guarantee and evidence of insurances, the primary judge should have found that a notice to proceed issued by the Superintendent had waived on behalf of the principal the requirement for the conditions precedent to be satisfied - appeal dismissed.
Alliance Building and Construction Pty Ltd (I B C)

Queensland Racing Integrity Commission v Endresz; Racing Queensland Board v Endresz [2024] QCA 76
Court of Appeal of Queensland
Morrison JA, Fraser AJA, & Williams J
Administrative law - a gelding named Alligator Blood won a race on the Gold Coast with prize money of almost $1million payable to the owners - a prohibited substance was detected in the horse's urine sample - the trainer was charged with a contravention of the Australian Rules of Racing for bringing a horse with a prohibited substance to a racecourse for the purpose of participating in a race - at a steward's inquiry the trainer was found guilty and fined $20,000, and, by force of the Australian Rules of Racing, the horse was disqualified from the race - the owners were not given any formal notice of the stewards' inquiry or the hearing of the charge against the trainer, and were not afforded an opportunity to be heard by the stewards - the owners commenced proceedings, contending that they had been denied natural justice and seeking a declaration that the disqualification was void and of no effect - the primary judge held that the disqualification was void - the Commission appealed - held: the race was conducted under the Australian Rules of Racing, which embody a contract - the Australian Rules of Racing also have a public character, both because public bodies exercise statutory functions under the Rules and because rules of racing made under statute supplement and confirm at least some of the rules in the Australian Rules of Racing - the natural meaning of the words "the horse must be disqualified" in the Australian Rules of Racing, when understood in their context is as a command to the stewards to disqualify the horse, rather than a self-executing provision - such disqualification was therefore a penalty imposed by the stewards - the owners therefore had right of appeal under the Australian Rules of Racing against the disqualification - however, this right of appeal did not mean that the stewards were not bound to afford procedural fairness to the owners - the finality, immediacy, and significance of the adverse consequences for the owner were matters of importance in favour of procedural fairness being afforded in the original stewards inquiry, notwithstanding the right of appeal - the Australian Rules of Racing conferred upon the owners both a contractually enforceable entitlement to procedural fairness as a condition of any application of the rule permitting the stewards inquiry and a right of appeal in respect of a disqualification consequent upon that inquiry - appeal dismissed.
Queensland Racing Integrity Commission v Endresz; Racing Queensland Board (I B)

Poem for Friday

Dreams Within Dreams

By: Fiona Macleod (1855-1905)

I have gone out and seen the lands of Faery
And have found sorrow and peace and beauty there,
And have not known one from the other, but found each
Lovely and gracious alike, delicate and fair.

“They are children of one mother, she that is called Longing,
Desire, Love,” one told me: and another, “her secret name
Is Wisdom:” and another, “they are not three but one:”
And another, “touch them not, seek them not, they are wind and flame.”

I have come back from the hidden, silent lands of Faery
And have forgotten the music of its ancient streams:
And now flame and wind and the long, grey, wandering wave
And beauty and peace and sorrow are dreams within dreams.

William Sharp (12 September 1855 - 12 December 1905) wrote poetry, fiction and plays under the pseudonym “Fiona Macleod”. He was born in Paisley and attended the University of Glasgow. He was part of Dante Gabriel Rosetti’s circle, and was also a prominent figure in the Celtic revival of the 1890’s, together with W. B. Yeats, and much of his work as “Fiona Macleod” concerns Celtic traditions and folklore. He also published numerous books under his own name, including biographies of Rosetti, Swinburne and Browning. Suffering from poor health for most of his life, he died at the age of 50 in Sicily.

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