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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)

Bailey v McCrae & Ors (ACAT) - defamation claim against alleged owner of YouTube channel and person who conducted interview on that channel - claim failed against owner as he was not a publisher - claim succeeded against interviewer and damages awarded (I)

Rossi v Qantas Airways Ltd (FCAFC) - primary judge had been correct to find that an employee had had capacity to enter into a settlement of a workers compensation claim (B I)

Credit Suisse Virtuoso SICAV-SIF v Insurance Australia Limited (No 2) (FCA) - companies had breached their *Hearn v Street* obligations by using documents discovered in Australian proceedings to seek an anti-suit injunction in England restraining their joinder to the Australian proceedings (B I)

Singh v AKM Investments Group Pty Ltd (NSWCA) - decision of primary judge that the terms of an oral agreement were that an advance was a loan used for a property development, rather than an equity investment in that property development, upheld on appeal (I B C)

Firmtech Aluminium Pty Ltd v Xie; Zhang v Xu; Xie v Auschn Conveyancing & Associates Pty Ltd (No 2) (NSWSC) - breaches of directors' and fiduciary duties entitled injured party to elect between account of profits and equitable compensation - the Court now clarified the timing of the election and how quantum of profits should be determined (B C I)

Re Allan (dec'd) (QSC) - deceased who destroyed her last will shortly before her death with the intention of revoking it, in the belief this would revive her one previous will, had in fact died intestate - letters of administration in intestacy granted to the deceased's husband (I B)

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Summaries With Link (Five Minute Read)

Bailey v McCrae & Ors [2024] ACAT 82
Australian Capital Territory Civil and Administrative Tribunal
Senior Member D Stewart
Defamation - a YouTube channel published a live video interview titled "D.O.T. Pedophiles (sic) Rule the World" - after serving a concerns notice, the applicant applied to the Tribunal, asserting the first respondent owned that YouTube channel and the second respondent conducted the interview, and imputations including that she was a member of a group which sexually abuses children and engages in child trafficking - held: the applicant had provided URLs for other copies of the video, and the first respondent submitted that these no longer linked to the video, and the Tribunal should infer (including under the rule in *Jones v Dunkel*) the applicant had lied about the URLs, and the URLs had never linked to the video - the Tribunal is not bound by the rules of evidence, but the rule in *Jones v Dunkel* reflects that the Tribunal actually be satisfied of relevant matters - however, it cannot give the necessary positive evidence for such satisfaction - the principle in *Briginshaw* applied, and seriousness of allegations and consequences of adverse findings were relevant to the Tribunal's satisfaction - the Tribunal was not satisfied the applicant had lied or the video did not previously exist at the URLs - a URL is not evidence in itself of the content of what it linked to, but can show the intended basis of a witness's evidence, and show material that might be available, when combined with a screenshot or material on a USB, to establish the provenance of a witness's evidence - the continuing availability of the video on other sites was relevant to the grapevine effect and future harm - the first respondent did not actually perform the act of communication, but could be a publisher if he facilitated, encouraged, and assisted the communication of the video - he had no knowledge of the video before its release and played no direct role in its publication - he could have removed the video from the channel, but this was insufficient - the channel was a shared platform where the first respondent acted in common with others in communicating content under a single banner, which was also insufficient - the first respondent was not a publisher, and the claim against him must fail - the video conveyed the imputations alleged, which would be understood by ordinary members of the community to lower the applicant's reputation in the public at large, and so were defamatory - the video identified the applicant, including her name and social media pseudonym, as well giving her location in the period following the livestream - neither respondent asserted any defence, such as innocent dissemination - defamation was established against the second respondent - there was no evidence it was reasonably foreseeable the video would be republished at other sites, so the asserted republications were not relevant to damages - the applicant gave evidence of requests to the second respondent after publication, and replies being an initial offer to help protect the applicant, which turned into abuse - as not all messages were provided, the Tribunal did not take the abuse at face value, but did find the response was not reasonable, and aggravated hurt and injury - damages awarded against the second respondent of $5,000 for non-economic loss and $5,000 for aggravation.
Bailey (I)

Rossi v Qantas Airways Ltd [2024] FCAFC 144
Full Court of the Federal Court of Australia
Snaden, Hatcher, & Horan
Capacity - in 2006, Rossi made a workers compensation claim against Qantas - in 2008, the proceedings settled pursuant to a settlement deed under which Rossi agreed to accept $75,000 in full and final settlement of any claims relating to her employment - Rossi now contended she had not had mental capacity to enter into that deed - she sought to have the deed set aside, and leave to bring an application under the *Australian Human Rights Commission Act 1986* (Cth) against Qantas for unlawful discrimination on the grounds of sex and disability, and sexually harassing conduct - the primary judge held Rossi had not shown she had lacked mental competence and refused to set aside the settlement deed, and dismissed the underlying application for leave to proceed under the *Australian Human Rights Commission Act* (see Benchmark 5 September 2023) - Rossi appealed - held: the correctness standard of appellate review applied to this appeal - the question was whether Ms Rossi was a "handicapped person" within the meaning of O15.01 of the *County Court Rules of Procedure in Civil Proceedings 1999* (Vic) - the primary judge's reasons demonstrated that the delay of about 18 months between hearing and giving judgment did not weaken the advantage she enjoyed as trial judge - the primary judge had not erred in considering that Rossi's capacity to enter into the Deed was to be measured by whether she would have understood the nature and effect of the transactions then contemplated if an explanation had been given to her and that this test would be satisfied if Rossi had the capacity to understand something of her prospects of success, that any claims against Qantas would be resolved and come to an end if a settlement was achieved, that there would be no necessity for a trial, and that she would be paid the sums of money for which the Deed provided - the focus of the assessment of capacity in the context of the compromise of litigation must be narrower than the test Rossi proposed, which was drawn from a case that decided whether a plaintiff with acquired brain injury had sufficient capacity to have access to a settlement sum - the Deed, and the compromise in its totality, was not complex - capacity to understand a transaction does not required that it be shown that the person actually understood the transaction - the primary judge's findings supported her inference that Rossi had the capacity to understand the settlement process, deed, and settlement - the primary judge was correct in treating her findings as to Rossi's presentation and level of engagement at a conference as relevant to her capacity at the time of signing the deed two days later - other grounds of appeal rejected - appeal dismissed.
Rossi (B I)

Credit Suisse Virtuoso SICAV-SIF v Insurance Australia Limited (No 2) [2024] FCA 1308
Federal Court of Australia
Moshinsky J
Private international law - ten proceedings were travelling together in the Federal Court, in which the applicants sought judgment against Insurance Australia Limited for amounts said to be payable under insurance policies purportedly issued by an authorised representative of IAL

to two Greensill companies - the IAL respondents contended Marsh Ltd and Marsh Pty Ltd were concurrent wrongdoers - Marsh Ltd obtained an ex parte interim anti-suit injunction from the English High Court restraining a Greensill company and its administrator from bringing any claims against Marsh Ltd in Australia in relation to certain arrangements - the English court refused an anti-suit injunction in respect of Marsh Pty Ltd - Greensill and its administrator contended that Marsh Limited had used documents in their English anti-suit application that Greensill had provided by way of discovery in the Australian litigation, and had therefore breached their *Hearn v Street* obligations - the Court granted an anti-anti-suit injunction restraining Marsh Pty Ltd seeking an anti-suit injunction in England against Greensill or its administrator, but refused to grant such an injunction against Marsh Ltd (see Benchmark 17 October 2024) - the Court now decided whether the Marsh parties had breached their *Hearn v Street* obligations, and, if so, whether the Marsh parties' should be released form those obligations, either *nunc pro tunc* or prospectively - held: the Court did not accept the Marsh parties' contention that their use of the documents in the English proceedings was not for a collateral purpose, because the issue of forum formed part of the dispute between the parties, or because the issue was not "unconnected" or "unrelated" to the claims in the Australian proceedings - the test for permissible use is that set out by the majority of the High Court in *Hearn v Street*, namely that a party obtaining disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence - the purpose for which the discovered documents were given was the conduct of the Australian proceedings - the Marsh parties had in fact used the discovered documents to obstruct the Australian proceedings - the Court also did not accept the Marsh parties' contention that their *Hearn v Street* obligations yielded to their obligation to make full and frank disclosure to the English court on an ex parte application - the Court was satisfied (to the requisite standard) that the Marsh parties had breached their *Hearne v Street* obligations - the Marsh parties should not be granted a *nunc pro tunc* release from their obligations, as their breaches were serious, and it was not appropriate to regularise that situation - however, a prospective release from their obligations would facilitate the parties being able to make submissions to the English court at the forthcoming hearing, and was not opposed by Greensill or its administrator - order made that the Marsh parties were released from their *Hearne v Street* obligations in respect of the discovered documents so that those documents could be used for the purpose of the anti-suit application before the English court.
Credit Suisse Virtuoso SICAV-SIF (B I)

Singh v AKM Investments Group Pty Ltd [2024] NSWCA 268
Court of Appeal of New South Wales
Bell CJ, Gleeson, & Stern JJA
Oral contracts - Grewal was a property developer and sole director of Ace Developers - Gaba was a businessman with wide and varied commercial interests, who conducted his businesses through a number of corporate entities, including AKM - Grewal and Gaba had conducted a property development together - Grewal and Gaba made an oral agreement under which Gaba caused AKM to advance $190,000 to Grewal's wife - AKM and Gaba later sued for repayment

of the $190,000 plus 12% interest, on the basis the agreement was for a loan on such terms for 12 months - Grewal contended that the agreement was that the money be advanced as a capital contribution by Mr Gaba towards a new residential property development joint venture - the primary judge found AKM had advanced the $190,000 as a loan and that Grewal had to repay it, but was not satisfied that there had been agreement as to the term or interest, and awarded interest at the Court's prejudgment rate from the commencement of the proceedings - Grewal appealed - held: there was no doubt the parties reached a consensus as to their agreement and its subject matter which was binding on them - there was also no doubt as to the parties - the transfer of the $190,000 pursuant to an express oral agreement between Grewal and Gaba relating to the site of the proposed new development was admitted on the pleadings - the only issue was the terms of the oral agreement that went to the character of the advance, as either a loan or an investment in the property development - s140(2)(b) of the *Evidence Act 1995* (NSW) provides that, in deciding whether it is satisfied that a party's case in a civil proceeding has been proved on the balance of probabilities, the court is to take into account the nature of the subject matter of the proceeding - here, the nature of the subject-matter of the proceeding was a money claim, and the only issue was the characterisation of an admitted agreement - the primary judge had to be persuaded about what was said in a conversation between Gaba and Grewal, but did not have to make a finding as to the precise words spoken - the primary judge's finding that he was satisfied that there was a conversation or conversations between Gaba and Grewal in which a loan was sought and agreed to was a finding expressing a conclusion on the evidence - on a fair reading of the primary judge's reasons, the judge felt an actual persuasion that Grewal said words that would have conveyed to Gaba (a reasonable person in Gaba's position) that Grewal was asking for a loan and Gaba said words which conveyed to Grewal (or a reasonable person in Grewal's position) that he agreed to that request - there was powerful contemporaneous evidence from which it was well open to draw an inference, as the primary judge did, that there was a conversation or conversations as found by the primary judge - appeal dismissed.
View Decision (I B C)

Firmtech Aluminium Pty Ltd v Xie; Zhang v Xu; Xie v Auschn Conveyancing & Associates Pty Ltd (No 2) [2024] NSWSC 1427
Supreme Court of New South Wales
Nixon J
Remedies for breach of directors' duties - in 2018, Xu and a married couple, Zhang and Xie, agreed to establish Firmtech Aluminium Pty Ltd to manufacture and install aluminium products - Xu and Zhang were directors and 50% shareholders, and Xie was the general manager - while they were director and general manager respectively, Zhang and Xie diverted projects to two of their own companies - Xu and Firmtech sued Xhang, Xie, and their companies for breach of directors' and fiduciary duties - the Court held that that Zhang and Xie breached their statutory and fiduciary duties to Firmtech and their companies had knowingly participated in those breaches, and that Firmtech was entitled, at its election, to either an account of profits from the projects that were diverted or to equitable compensation for the loss suffered by the diversion,

and was entitled to make a split election as between the defendants (see Benchmark 18 October 2024) - the parties could not agree on the timing of Firmtech's election, and how the quantum of profits should be determined if required - held: there was conflicting authority regarding the timing of Firmtech's election - Xu and Firmtech were not in a position, as at the trial, to lead evidence of the profits earned from, or loss or damage suffered in respect of, each of the diverted projects, and they remained unable to make an informed choice between equitable compensation or an account of profits in respect of those projects - they should have the opportunity to obtain further documents from the defendants and to lead supplementary expert evidence calculating the outstanding issues of quantum arising from the Court's earlier findings, with a hearing to determine those outstanding issues - that should occur before Firmtech's election - Firmtech should make its election within a short period after the Court's delivery of reasons on the outstanding issues and before entry of judgment - the usual method for taking an account of profits is that the account is verified by affidavit, a method is determined to resolve objections, and on completion of the procedure, the defaulting party is ordered to pay the amount found to be due - however, the appropriate way to proceed is a matter for directions, in which the Court must seek to give effect to the overriding purpose in s56 of the *Civil Procedure Act 2005* (NSW). - the most efficient and cost-effective method here was for the outstanding issues of quantum to be the subject of supplementary expert reports and a further joint report, followed by a hearing to resolve any outstanding matters in dispute.
View Decision (B C I)

Re Allan (dec'd) [2024] QSC 277
Supreme Court of Queensland
Davis J
Probate - a married couple made wills in 1997 leaving their entire estates to each other, and providing that, if they were both dead, all four of their parents would be appointed guardians of their two children - they made new wills in 2003, with the only change being that, instead of all four grandparents being nominated as guardians, only the husband's parents were nominated - in 2009, months before the wife died of metastatic cancer, they attended the office of their solicitors - the husband gave sworn evidence that he and the wife both destroyed their 2003 wills with the intention of destroying them, believing that this would reinstate the 1997 wills - the original of the wife's 1997 will could not be located, but a copy was in existence - the husband applied for letters of administration in respect of the copy of the wife's 1997 will - the Court refused the application - the Court inferred the wife's 2003 will would have contained a provision revoking all previous wills, so that, upon execution of the 2003 will, the wife had revoked her 1997 will - the Court found that the wife had revoked her will by destroying it with the intention of revoking it - the Court found that, as a matter of law, the revocation of the 2003 will did not revive the 1997 will - the Court found that none of the circumstances required by s17 of the *Succession Act 1981* (Qld) for revival of a revoked will were present - the husband then accepted that the wife had died intestate and sought letters of administration in intestacy, and sought that that application be decided on the papers without oral hearing - held: under UCPR r489 the sole question that arose in this case was whether the court considered it inappropriate

to determine the matter without oral hearing, which it did not - under UCPR r610, the highest priority for a grant of letters of administration in intestacy is given to a deceased's surviving spouse - although the court may grant letters of administration to any person regardless of priority, no party seeking priority to the husband had applied for a grant - the Court was satisfied the wife was deceased, that she had died intestate, that the husband had been her spouse at the time of her death, that the husband had first priority to a grant of letters of administration and no other party has applied - subject to the requirements of the registrar, letters of administration in intestacy of the wife's estate should be granted to the husband - the wife's estate should bear the costs of the application on an indemnity basis.
Re Allan (dec'd) (I B)

Poem for Friday

How Do I Love Thee? (Sonnet 43, from Sonnets from the Portuguese)

By Elizabeth Barrett Browning (1806-1861)

How do I love thee? Let me count the ways.
I love thee to the depth and breadth and height
My soul can reach, when feeling out of sight
For the ends of being and ideal grace.
I love thee to the level of every day's
Most quiet need, by sun and candle-light.
I love thee freely, as men strive for right.
I love thee purely, as they turn from praise.
I love thee with the passion put to use
In my old griefs, and with my childhood's faith.
I love thee with a love I seemed to lose
With my lost saints. I love thee with the breath,
Smiles, tears, of all my life; and, if God choose,
I shall but love thee better after death.

Elizabeth Barrett Browning, English poet was born on 6 March 1806, in County Durham, the eldest of 12 children, 11 of whom survived into adulthood. She was ill from her mid teens. She was influential in campaigning for the abolition of slavery and the introduction of child labour protection legislation. Her grandfather had been a slave owner in sugar plantations in Jamaica. She was a contemporary of, and met Coleridge, Tennyson, Carlyle, Wordsworth and Mitford. She met Robert Browning in 1845, and after a secret marriage, they moved to Italy in 1846. Whiting, describes her as "the most philosophical poet" living a life as "a Gospel of applied Christianity". Barrett Browning died on 29 June 1861 at the age of 55, in Florence Italy.

How Do I Love Thee? sung by Femmes de Chanson, (2012)
How Do I Love Thee? (Nathan Christensen) - Femmes de Chanson - 2012 (youtube.com)

How Do I Love Thee read by Dame Judi Dench
How Do I Love Thee? (Sonnet 43) by Elizabeth Barrett Browning (read by Dame Judi Dench) (youtube.com)

Reading 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.

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