

Friday, 17 March 2023

Daily Civil Law A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (One Minute Read)

McPhee v Colina Insurance Ltd (Bahamas) (UKPC) - insurance - universal life insurance - contract allowed insurer to increase charges - facts necessary to allow increase in charges existed (I)

Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd (HCA) - intellectual property - trademarks - reputation should play no role in assessment of deceptive similarity - appeal allowed (I B)

Barnett v Secretary, Department of Communities and Justice (HCA) - family law - improper removal of child from Ireland - grant of special leave to appeal revoked on evidence requiring rejection of appellant's sole ground of appeal (I)

Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue (NSWCA) - doctors contracted by operator of medical centres agreed to pay 30% of billings to operator - NCAT upheld Chief Commissioner's assessment of remaining 70% of billings as wages paid by operator for the purposes of payroll tax - leave to appeal refused (I B)

Perkins v Carey (NSWSC) - land law - mother paid for industrial warehouse owned in common in equal shares by her and her son - mother intended for son to own 50% of the property, but did not intend he receive 100% of all future rental income - trustees for sale appointed (I B C)

Scardamaglia v Amcor Pty Ltd & Anor (VSC) - administrative law - judicial review - industrial

deafness - medical panel should have considered effect on tinnitus on function of ear - question remitted to differently constituted medical panel (I)

HABEAS CANEM

The classic catch



Summaries With Link (Five Minute Read)

McPhee v Colina Insurance Ltd (Bahamas) [2023] UKPC 8

Judicial Committee of the Privy Council

Lord Hodge, Lord Leggatt, Lord Stephens, Lady Rose, Lord Woolman

Insurance - Bahamas attorney took out life insurance policy - insurer increased charges - in 2014, insurer served notice that policy would lapse if unpaid amounts were not by a certain date - amounts tendered one day late, and insurer asserted policy had lapsed - attorney contended the increases were unlawful - Supreme Court of The Bahamas and Court of Appeal held in favour of insurer - appeal to Privy Council - held (Lords Leggatt and Stephens dissenting): the insurer was contractually entitled to increase the charges - the policy stated this explicitly, and there was no room for application of the contra proferentem rule - the relevant facts allowing the insurer to increase the charges existed - even if (as held by the dissenting Lords), the insurer bore the burden of establishing these facts, the increases were justified - His Majesty advised that the appeal should be dismissed.

[McPhee \(I\)](#)

Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd [2023] HCA 8

High Court of Australia

Kiefel CJ; Gageler, Gordon, Edelman and Gleeson JJ

Intellectual property - trademarks respondent manufactures botox and owns various trade marks including the word "BOTOX" - appellants supply cosmetic products - respondents alleged to have used the marks "instant Botox® alternative" and "PROTOX" - respondent alleged these marks infringed its trademarks - at first instance, Federal Court dismissed the respondent's claim - on appeal, the Full Court of the Federal Court held that that appellants had infringed respondents' trademarks - appellants appealed to High Court - held: reputation should play no role in determining whether two marks are deceptively similar - the appellant had not used "instant Botox® alternative" as a mark - "PROTOX" was not deceptively similar to "BOTOX" - respondent had not contravened either s18 or s29 of the Australian Consumer Law - appeal allowed.

[Self Care IP Holdings Pty Ltd \(I B\)](#)

Barnett v Secretary, Department of Communities and Justice [2023] HCA 7

High Court of Australia

Kiefel CJ; Gageler, Gordon, Gleeson and Jagot JJ

Family law - appellant is mother of child born in Ireland - mother removed child from Ireland to Australia without consent of father - District Court of the Dublin Metropolitan District had declared father the child's guardian - respondent, at the father's request, applied to Family Court seeking return of child to Ireland - Family Court found removal of child from Ireland wrongful pursuant - ordered Child returned to Ireland - mother appealed - Full Court dismissed appeal - mother granted special leave to appeal to High Court - sole ground on which special leave granted was an allegation the Full Court had erred in holding the Irish court's declaration gave

Benchmark

rise to issue estoppel when the Irish court's reasons for making the declaration were not admitted - respondent applied to revoke grant of special leave - transcript of Irish court's reasons admitted at hearing of this application - Irish Court had found, as an essential element of its reasoning, that the father had rights of custody at the relevant time - contrary to the interests of justice to allow the appeal to proceed on the false premise of the unavailability of the Irish Court's reasons, where those reasons substantiate what both courts below had drawn from the terms of the declaration - grant of special leave revoked.

[Barnett \(I\)](#)

Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue [2023] NSWCA 40

Supreme Court of New South Wales - Court of Appeal

Meagher JA, Leeming JA, Griffiths AJA

Banking - payroll tax - payroll tax is assessed on "taxable wages" above a certain threshold - applicant operates medical centres in western Sydney - doctors worked in the medical centres in accordance an agreement to bulk bill all services and pay 30% of the total billings to the applicant - Chief Commissioner assessed the remaining 70% as contributing to the applicant's taxable wages for the purpose of payroll tax - NCAT and NCAT appeal panel rejected the applicant's challenge to this assessment - applicant sought appeal to Court of Appeal - held: the doctors provided services to the applicant, as well as to their patients - the doctor's attendance at the medical centres to provide care to patients was an important aspect of the applicant's business - the Court was also unpersuaded that any question of law arose from a finding that the doctors provided services to the applicant - leave to appeal refused.

[Thomas and Naaz Pty Ltd \(I B\)](#)

Perkins v Carey [2023] NSWSC 210

Supreme Court of New South Wales

Peden J

Land law - the plaintiff and defendant were mother and son, respectively, who owned an industrial warehouse as tenants in common in equal shares - the mother paid the entire purchase price in 2010, borrowing money solely in her own name to do so - until about 2012, the son operated a business from the property repairing and reselling second hand cars that had been written off by insurers - from 2018, the property was leased - the son received all the rental income until September 2022 and did not account for any of it to the mother - Veronica commenced proceedings seeking a declaration that the son holds his half of the property on resulting trust for her, or an order appointing trustees for sale of the property under s66G of the *Conveyancing Act 1919* (NSW) - held: on the evidence, the presumption of advancement applied, and the mother's intention was to assist her son by allowing him to own half of the property that she entirely paid for - the mother had not intended to gift all future rental income to the son to her own detriment - the son must account for 50% of the rental income he received before September 2022 - trustees for sale under s66G should be appointed - 50% of the mothers costs of the proceedings should be paid from the proceeds of sale - 50% of the rent received before September 2022 should also be paid to the mother from the proceeds of sale -



the balance of the proceeds of sale should be distributed equally between mother and son.
[Perkins](#) (I B C)

Scardamaglia v Amcor Pty Ltd & Anor [2023] VSC 114

Supreme Court of Victoria

Forbes J

Administrative law - judicial review - the plaintiff claimed an impairment benefit for industrial deafness - 0% assessment of whole person impairment (WPI) - dispute referred to a medical panel - medical panel concluded WPI was 0% - plaintiff applied to quash the medical panel's opinion and remit the question to a differently constituted medical panel - sole ground was that the medical panel did not assess his deafness in accordance with s91 of the *Accident Compensation Act 1985* (Vic) - in particular, it failed to account for tinnitus - held: the medical panel erred by failing to consider the effect of tinnitus on the hearing function of the ear - the panel should have made such additional allowance of up to 5% for the effect of tinnitus as it considered appropriate - question remitted to a differently constituted medical panel to conduct the required assessment in accordance with the law.

[Scardamaglia](#) (I)



Poem for Friday

Winchester (“Venta”)

By: Jane Austen (1775 – 1817)

When Winchester races first took their beginning
It is said the good people forgot their old Saint
Not applying at all for the leave of Saint. Swithin
And that William of Wykeham's approval was faint.

The races however were fix'd and determined
The company met & the weather was charming
The Lords & the Ladies were sattin'd & ermin'd
And nobody saw any future alarming.

But when the old Saint was inform'd of these doings
He made but one spring from his shrine to the roof
Of the Palace which now lies so sadly in ruins
And thus he address'd them all standing aloof.

Oh subject rebellious, Oh Venta depraved!
When once we are buried you think we are dead
But behold me Immortal. — By vice you're enslaved
You have sinn'd and must suffer. — Then further he said

These races & revels & dissolute measures
With which you're debasing a neighbourly Plain
Let them stand — you shall meet with a curse in your pleasures
Set off for your course, I'll pursue with my rain.

Ye cannot but know my command in July.
Henceforward I'll triumph in shewing my powers,
Shift your race as you will it shall never be dry
The curse upon Venta is July in showers.

Venta is the old Roman name for Winchester. St Swithin was the bishop of Winchester, who died in 862. William of Wykeham (1320 to 1404) was the founder of Winchester College and New College Oxford.

Jane Austen, an English novelist, was born on 16 December 1775 and died on 18 July

1817, three days after writing the Winchester poem, on St Swithin's Day, which was also the day of the Winchester Races. When she wrote the poem she knew that she did not have long to live. She was the daughter of Rev. George Austin, and his wife Cassandra. Outside her family she was taught briefly at Abbey Boarding school in Reading, and in the home of Mrs Cawley. She wrote about 3,000 letters during her life, few of which survive. Between 1795 and 1799 she began writing *Sense and Sensibility*, (published 1811), *Pride and Prejudice*, (1813) and *Northanger Abbey*, (published posthumously in 1818). Her novels included *Mansfield Park*, (1814), *Emma*, (1815) and *Persuasion*, (1818). Jane Austen's novels were perceptive, humorous, and insightful works of social realism and commentary. Sir Walter Scott wrote in 1826 that he 'Also read again and for the third time at least Miss Austen's very finely written novel of *Pride and Prejudice*'. His positive review of *Emma* had been published in 1816. <https://www.jstor.org/stable/457636> Jane Austen's books have remained in publication, translated into 35 languages, and inspired many adaptations, popular films and series. Jane Austin died in 1817, aged 41, after a year of ill health. She is buried at Winchester Cathedral.

https://en.wikipedia.org/wiki/Jane_Austen

Emma Corrin, from *The Crown*, reads a letter from 13 year old Jane Austen, to the Editors of the magazine, *The Loiterer*.

[The Crown's Emma Corrin reads a 13-year-old Jane Austen's letter - YouTube](#)

Pride and Prejudice, radio play, NBC University Theatre, Broadcast 20 February 1949, starring Angela Lansbury as Elizabeth Bennet.

<https://www.youtube.com/watch?v=KigkdzujC74>

Emma Thompson's acceptance speech for Best Screenplay, for ***Sense and Sensibility***, at the Golden Globes 1996, reading a letter, as if written by Jane Austen.

https://www.youtube.com/watch?v=m-zuF_AWvN4

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