AR CONOLLY & COMPANY
LAWYERS

Benchmark

Friday, 17 May 2024

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

Search Engine

Click here to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (One Minute Read)

South East Forest Rescue Inc v Forestry Corporation of New South Wales (No 2) (NSWCA) - primary judge erred in holding that the appellant did not have common law standing to bring proceedings to enforce environmental legislation (I B C)

QBT Pty Ltd v Wilson (NSWCA) - the literal reading of a contractual clause that would give the purchaser of shares a windfall that the parties could not have intended was absurd, and the primary judge had been correct to construe the clause as the parties had clearly intended (B C I)

Needham v Wollongong City Council (NSWSC) - workers compensation - Appeal erred in accepting that the medical dispute before it excluded ulnar nerve impairment (I)

Metricon Homes Pty Ltd as trustee for Metricon Homes Unit Trust v Lipari (NSWSC) - builder had constructed a house with a defective slab - owner not entitled to costs of demolition and rebuilding as such a course would not be reasonable - damages were the amount paid for the slab (I B C)

Szwarcbord v Charbord Investments Pty Ltd (VSCA) - security for costs issued where they would probably not stifle the appeal - the public interest in determining an issue on appeal is unlikely to be a significant factor against ordering security unless it appears that doing so would stifle the appeal (B C I)

HABEAS CANEM

The original Benchmark Team

AR Conolly & Company Lawyers
Level 29 Chifley Tower, 2 Chifley Square, Sydney NSW 2000
Phone: 02 9159 0777 Fax: 02 9159 0778
ww.arconolly.com.au

Summaries With Link (Five Minute Read)

South East Forest Rescue Inc v Forestry Corporation of New South Wales (No 2) [2024] NSWCA 113

Court of Appeal of New South Wales

Adamson JA, & Basten & Griffiths AJJA

Environmental litigation - the appellant filed a summons in the Class 4 jurisdiction of the Land and Environment Court bringing civil enforcement proceedings against the respondent, seeking injunctive and declaratory relief concerning the respondent's forestry operations - the appellant claimed the respondent was unlawfully failing to protect gliders - the primary judge held the appellant did not have standing - the appellant appealed - held: the primary judge did not err in concluding that common law standing principles applied - the Court rejected the respondent's contention that the relevant provisions of the *Forestry Act 2012* (NSW) and *Biodiversity Conservation Act 2016* (NSW) constituted a code which excluded common law standing and limited enforcement to the entities identified in those provisions - much clearer language was required to oust well established common law standing - this was consistent with the presumption that courts do not impute to the legislature an intention to abrogate or curtail fundamental rights, privileges, or liberties other than by a law expressed with "irresistible clearness" - however, the primary judge had erred in holding that the appellants did not have common law standing - at common law, an applicant who attempts to bring civil enforcement proceedings seeking declaratory or injunctive relief in respect of unlawful conduct and does not rely on a private right or special damage to establish standing must demonstrate a "special interest" in the subject matter of the proceeding - the test focuses on the relative position of the applicant when compared with the broader population - the test is not confined to proprietary, business, or economic interests, but a mere emotional or intellectual concern is insufficient unless the applicant demonstrates that it has taken sufficient, concrete, or active steps to effectuate the particular concern - the special interest must not be merely a function of depth of feeling but must reflect the nature of the relationship between the applicant and the subject matter of the litigation - the appellant was founded in 2001 and was incorporated in 2010, and had set out its objects and purpose, and a vision statement, in its application for incorporation - these matters demonstrated the appellant's beliefs and concerns regarding particular aspects of environmental protection - this, in itself, may not suffice, but the evidence showed the appellant had taken a wide range of activities and concrete steps to give effect to its beliefs and concerns - the appellant's interest and concern to protect the relevant glider species and their habitat was not a recent development - since 2023, the appellant had conducted surveys for Greater Glider den trees in various State forests, including a joint survey with Bellingen Activist Network in the Styx River State Forest - the appellant's registered name "South East Forest Rescue Incorporated" bore little if any weight in determining whether the appellant had a special interest in glider habitats in the northern part of the State - if a body such as the appellant receives government funding that is likely to assist in establishing standing because the funding suggests that it is independently acknowledged that the body has a particular and responsible interest in a subject matter, but funding is not the only way this can be demonstrated - appeal allowed.

View Decision (I B C)

QBT Pty Ltd v Wilson [2024] NSWCA 114
Court of Appeal of New South Wales
Bell CJ, Ward P, & Leeming JA
Contracts - QBT purchased all the shares in TravelEdge Pty Ltd - one of the assets TravelEdge was 40% of a joint venture company, with STA holding the other 60% - the shareholders agreement between TravelEdge and STA in respect of the joint venture company included a change of control provision, which would entitle STA to acquire TravelEdge's 40% share after QBT acquired all the shares in TravelEdge - mindful of this, the agreement under which QBT purchased TravelEdge's shares provided for a "Completion Amount" of $24million, plus a "Deferred Amount" of $4million if STA gave its consent in writing to the change in control, and a lesser figure STA acquired TravelEdge's 40% stake in the joint venture company - STA did not consent in writing to the change in control, but also did not acquire TravelEdge's 40% stake - the primary judge held STA had to pay the full Deferred Amount of $4million - STA appealed - held: the primary judge had been correct to regard the relevant clause as providing for a binary outcome, that is, either STA would acquire TravelEdge's 40% stake or it would not - the structure of the clause suggested that there were precisely two eventualities, one of which would be applicable - further, the relevant clause was a definition of the term "Deferred Amount", which, unlike many of the defined terms, went to the heart of the parties' bargain, and it was unlikely that it would fail to attribute a dollar amount to the "Deferred Amount" - the clause also defined two further terms, "STA Consent Event" and "STA Non-Consent Event", which suggested a clause which exhausted the universe of possibilities - there was obviously an error in the parties' written contract, and it was not a typographical error, but a conceptual one - if the contract were given its ordinary literal meaning, QBT would receive a windfall which could not be what the parties had intended to agree to - it was commercially absurd for QBT to have agreed to pay a $4million component of the consideration for shares in TravelEdge if it retained the 40% stake in the joint venture company, and to pay an amount reflecting the price paid by STA for that stake if it STA acquired the stake, but to pay nothing in respect of this component of the consideration if TravelEdge did not obtain STA's consent in writing but nonetheless retained the 40% stake - here, the Court could not only be confident that the literal meaning contained an absurd mistake, but it also what the parties should to be taken to have intended, that, is a clause that provided for a binary outcome - appeal dismissed.
View Decision (B C I)

Needham v Wollongong City Council [2024] NSWSC 575
Supreme Court of New South Wales
Schmidt AJ
Workers compensation - Needham was working for the Council organising its 2020 Australia Day celebrations when she rolled her ankle while walking along a footpath, lost her balance, and fell forward, landing on her left elbow and face - she was seriously injured, and required surgery on both her left elbow and right ankle - she received various payments under the

Workers Compensation Act 1987 (NSW) and eventually pursued compensation under s66 - a medical assessor determined her whole person impairment (WPI) was 17% - an Appeal Panel held the medical assessor had erred in not confining his consideration of the impairment of her left upper extremity to her left elbow and by including the ulnar nerve, and assessed WPI as 12%, below the threshold for compensation - Needham sought judicial review of the Appeal Panel's decision - held: in her claims and her application for referral of a medical dispute, Needham had not referred to injury or impairment of her ulnar nerve, as those who originally examined her had tested for such impairment and found none - it was the assessor who later found on his examination and testing that Needham had suffered impairment to her ulnar nerve and so included that in his assessment - the Appeal Panel in these circumstances accepted that the medical dispute did not concern ulnar nerve impairment - the Appeal Panel had erred in this respect - the Commission's jurisdiction under s66 is not at large, but is confined by the claim made with respect to a specific injury which occurred in the course of employment on a specified date and the application pursued to resolve the medical dispute - on the authority of binding caselaw, it was Needham's original compensation claim letter, the Council's response, Needham's later application for assessment of the parties' resulting medical dispute, the Council's response to that application, and all the accompanying documents, which established what Needham had pursued and what the parties' resulting medical dispute concerned - a referral is capable of restriction by reference to body parts/systems, and what is referred may be a matter for an Appeal Panel's professional judgment, but a referral is also capable of being misread by a Panel - what Needham pursued, both by the original claim letter and the accompanying draft assessment application and by her final application, relevantly concerned permanent impairment of her left upper limb - neither her compensation claim nor her application for assessment of the medical dispute was confined to the impairment of her elbow, although the ulnar nerve is to be found there - the supporting documents established that what Needham had pursued encompassed the damage caused to the ulnar nerve, which the assessor had concluded had contributed to the impairment of Needham's upper extremity - appeal panel's decision set aside, and matter remitted to be considered by a differently constituted appeal panel.
View Decision (I)

Metricon Homes Pty Ltd as trustee for Metricon Homes Unit Trust v Lipari [2024] NSWSC 566
Supreme Court of New South Wales
Nixon J
Building and construction - Metricon constructed a house for Lipari on a property in Leppington - Metricon sued, claiming the unpaid balance of the contract price under the construction contract - Lipari contended she was entitled to set off the liability against Metricon's liability to her in respect of the costs of demolishing and rebuilding her home as a result of a defective concrete slab, the costs of various other defects, and the costs and reduction in property value occasioned by having to move the location of a swimming pool - held: the amount outstanding under the building contract was about $93,000 - Metricon accepted that there were defects in

the slab and that it was liable to Lipari, but there was a substantial dispute between the parties regarding the extent of the defects in the slab and the proper measure of loss - the only non-compliances which had been established are those which were conceded by Metricon - the Court was not satisfied that Lipari had established that there was any existing significant damage, or any real risk of future significant damage, to the slab or house as a result of the non-compliance with the relevant Australian Standard - Lipari was entitled to have a house constructed in accordance with the contract, and her loss was the cost of making the house conform to the contract, subject to the qualification that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt - it was therefore necessary to identify the benefit that would be obtained from demolishing and rebuilding - despite practical completion having occurred over six years ago, there was not a single instance of damage which met the definition of "significant" damage in the relevant Australian Standard - if there were "significant" damage to the walls of the house as a result of movement of the slab, there were various steps which could be taken short of demolition - the "last resort" option described in the relevant Australian Standard in cases of "significant" damage was not demolition and reconstruction, but structural repairs to the footing system, such as deep underpinning - it would not be reasonable to demolish and rebuild the house - Lipari bargained for, and did not receive, a slab of a particular type, and the amount she paid for the bargained-for slab reflected the loss suffered by the failure to provide a slab of that type - damages awarded of the total amount Lipari paid for the slab, which was about $55,000 - Lipari was entitled to set off this amount against the unpaid balance of the contract price “Lipari had not established that Metricon engaged in misleading or deceptive conduct or in respect of her claims regarding the swimming pool.
View Decision (I B C)

Szwarcbord v Charbord Investments Pty Ltd [2024] VSCA 92
Court of Appeal of Victoria
Beach & Orr JJA
Security for costs - a daughter of a property developer was named in the sale contract as the sole purchaser of a unit, but contributed no funds to the purchase - the funds came from various companies controlled by her father and a bank loan - after the daughter's relationship with the rest of her family soured, the father requested she consent to the sale of the unit, which she refused - the father and his companies commenced proceedings - the primary judge held that the unit had not been a gift and the daughter held the unit on a common intention constructive trust - the daughter had alleged that the arrangements had been part of unlawful tax avoidance, but the primary judge stated that he had no proper basis to say the father's business practices were inherently illegitimate or unlawful, and noted that the father and his companies would need to take prompt remedial action to file amended documents with the State Revenue Office to make clear that the daughter did not hold the beneficial interest in the unit - the daughter sought leave to appeal - the respondents sought security for costs on the basis that she resided outside Victoria - held: the general principle is that the security for costs will be ordered if (1) there is an unacceptable risk that the applicant would not be able to meet a costs order in favour of the

respondent if the application or appeal is unsuccessful; and (2) there are no discretionary or other considerations which require that security for costs not be ordered - the starting point is whether there was an unacceptable risk the daughter would not be able to meet a costs order - the Court was satisfied there was such an unacceptable risk - the Court was not satisfied the application for leave to appeal was patently without merit - the Court was not persuaded that granting security for costs would stifle the daughter's claim - the respondents did not dispute that the proposed appeal was defence in nature - the application for security for costs had been brought promptly - while there may be some public interest in the determination of the legality of the respondents' business practices, the daughter was not correct to say that the practical effect of the primary judgment was that it is permissible to submit knowingly false documents to taxation authorities where this is done as part of a business practice of minimising tax liabilities - the primary judge had said that documents which created the impression that the daughter was the beneficial owner 'cannot stand', and he ordered the respondents to 'regularise the situation' with the authorities - in any event, the public interest in the determination of an issue on appeal is unlikely to be a significant factor unless it appears that ordering security would stifle the appeal - security for costs ordered.
Szwarcbord (B C I)

Poem for Friday

Fear no more the heat o' the sun
(a song from Cymbeline)

By: William Shakespeare (1564-1616)

Fear no more the heat o' the sun,
Nor the furious winter's rages;
Thou thy worldly task hast done,
Home art gone, and ta'en thy wages:
Golden lads and girls all must,
As chimney-sweepers, come to dust.

Fear no more the frown o' the great;
Thou art past the tyrant's stroke;
Care no more to clothe and eat;
To thee the reed is as the oak:
The scepter, learning, physic, must
All follow this, and come to dust.

Fear no more the lightning flash,
Nor the all-dreaded thunder stone;
Fear not slander, censure rash;
Thou hast finished joy and moan:
All lovers young, all lovers must
Consign to thee, and come to dust.

No exorciser harm thee!
Nor no witchcraft charm thee!
Ghost unlaid forbear thee!
Nothing ill come near thee!
Quiet consummation have;
And renownèd be thy grave!

The reading today is by Colin McPhillamy, actor, and Alan's cousin. Colin was born in London to Australian parents. He trained at the Royal Central School of Speech and Drama in London. In the UK he worked in the West End, at the Royal National Theatre for five seasons, and extensively in British regional theatre. In the USA he has appeared on Broadway, Off-Broadway and at regional centres across the country. Colin has acted in Australia, China, New Zealand, and across Europe. Colin is married to Alan's cousin Patricia Conolly, the renowned actor and stage

actress https://en.wikipedia.org/wiki/Patricia_Conolly and https://trove.nla.gov.au/newspaper/article/47250992.

Bryn Terfel sings Shakespeare's song "Fear No More the Heat O' The Sun https://www.youtube.com/watch?v=SQNc1cxveUA

Click Here to access our Benchmark Search Engine