



Friday, 17 November 2023

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)

Graham v Newchurch (FCA) - orders made restraining respondents from diminishing the value of funds held by the Corporation and appointing a new IT provider - caretaker body ordered pending an AGM of the Corporation (I B)

Harrington v Shoard (QDC) - defamation claim succeeded where one neighbour accused another of being a paedophile (I)

In the matter of H&C Investment Holdings Pty Ltd (NSWSC) - application to rely on affidavits of deponents who did not attend Court for cross-examination rejected, as the plaintiffs had not shown they had taken all reasonable steps to secure the deponents' attendance (I B)

Carnegie v Nelson-Carnegie (NSWSC) - wife ordered to specifically perform obligations under a term sheet executed 11 years after after a financial agreement under Part VIIIA of the *Family Law Act 1975* (Cth) (I B)

Rosehill T1 Pty Ltd v Noah's Rosehill Waters Pty Ltd (WASC) - Court rejected application by shareholders to inspect the books of a property development company (I B C)

HABEAS CANEM

Urban Kissing Cousins - Ferdie and McGregor



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Summaries With Link (Five Minute Read)

Graham v Newchurch [2023] FCA 1411

Federal Court of Australia

Colvin J

Corporations - the applicant claimed to be a director and member of the Ngadju Native Title Aboriginal Corporation RNTBC - the Corporation was being managed by its board of directors in the absence of a chief executive officer, and there was currently no independent director of the Corporation - the Corporation was therefore unable to form a quorum for a meeting of directors and there was uncertainty as to the extent to which decisions could be made regarding its ongoing management - disputes had arisen concerning the control of the Corporation and whether particular persons have authority to conduct the affairs of the Corporation, including whether appropriate steps were taken in relation to the security of the Perth premises of the Corporation and access to those premises, as well as access to the computing system of the Corporation and whether it is appropriate for a new consultant to be appointed to conduct the IT system of the Corporation - the applicant sought injunctive relief to restrain some of the respondents from disposing of or dealing with or diminishing the value of funds held by the Corporation in certain nominated bank accounts and from appointing a new IT provider who would have control over access to the Corporation's computer systems - held: the applicant must demonstrate that (a) there is a serious question to be tried as to the basis for the claim to relief; (b) there is a likelihood of injury for which damages will not be an adequate remedy; and (c) the balance of convenience favours the granting of an interlocutory injunction - there was evidence that steps have been taken by the relevant respondents to alter the authority in relation to the conduct of the affairs of the bank account, despite being made aware of the current position concerning the management of the company - it was appropriate to make orders to ensure that the funds of the Corporation are properly protected pending an annual general meeting that had been convened in late November 2023 - it was not necessary to address the various allegations that have been made because, in the current circumstance of the Corporation, it was necessary to put in place some form of caretaker arrangement to facilitate the AGM and have the uncertainty in relation to the management of the Corporation resolved - the Corporation was established by legislation which is designed to have regard to cultural practices amongst aboriginal people and for particular purposes, as described in the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) - it was appropriate to have regard to those particular aspects of the Corporation and the purposes which it serves in deciding the appropriate orders - orders made providing for a caretaker body to meet and consider whether there are any particular arrangements that may be needed to be put in place for the purposes of the effective and valid conduct of the AGM that had not already been attended to and the extent to which funds of the Corporation need to be released for those purposes, having regard to the availability of funds.

[Graham](#) (I B)

Harrington v Shoard [2023] QDC 11

District Court of Queensland
Sheridan DCJ

Defamation - the plaintiff and defendant lived diagonally opposite each other for more than 15 years on the same street in a cul-de-sac at Logan Village - they had never been friends and the two families were constantly feuding - the defendant erected two signs on his property, which said, in part, "You dumb ferals need a sign. Keep out and keep your paedo mate on your side." and "Do not enter this property KEEP your MENTAL ISSUES on your side and try and get a life." - the plaintiff contended that the words on the signs conveyed that the plaintiff is a paedophile and had been trespassing on the defendant's property - there were also three oral statements in which the defendant allegedly conveyed that the plaintiff was a paedophile, two of which were to neighbours, and one of which was to the curator of the Logan City Museum - the plaintiff commenced proceedings in defamation, and also sought injunctive relief restraining the defendant from publishing the defamation further - held: in deciding on the meaning of an imputation of a particular statement, a court asks what an ordinary, reasonable reader in the general community would understand the published words to mean - the ordinary reasonable reader takes into account the forum in which the statements were published - the sign carried the imputation that the plaintiff was a paedophile, but not that he trespassed on the defendant's land - the oral statements also carried the imputation that the plaintiff was a paedophile - imputations of involvement in child abuse of any are the most serious imputations capable of being made, and to falsely call someone a paedophile is one of the worst possible things that might be said about a person - clearly, the proven imputations were defamatory - a defence of triviality under s33 of the *Defamation Act 2005* (Qld) succeeded with respect to the sign and the two oral publications to neighbours - the defence of triviality is concerned with the circumstances of the publication and whether the plaintiff was unlikely to sustain any harm - the harm element is confined to reputational harm, and does not extend to harm to feelings - defences of substantial truth and justification failed - the Court was not satisfied that the plaintiff had ever dealt with the alleged victim of his alleged paedophilia in a sexually inappropriate way or that there was any inference open that he was sexually attracted to her - the plaintiff succeeded in respect of the publication to the museum curator - an award of general damages for defamation serves three purposes: (1) to compensate for damage to both personal and, if applicable, business reputation; (2) to give consolation for the personal hurt and distress caused by the publication; and (3) to vindicate the person's reputation - although the accusation was vile and unsubstantiated, the harm done to the plaintiff was extremely modest and any injury very short lived - the plaintiff was entitled to a small component for aggravated damages, given the unjustifiable nature of the allegation, the persistence with a defence of justification, and the failure to admit that two of the oral publications were made - having regard to previous cases, general and aggravated damages awarded of \$15,000 - the defendant had not offered an undertaking not to repeat the defamation - defendant permanently restrained from publishing or causing to be published any statement that the plaintiff is a paedophile.

[Harrington](#) (1)

In the matter of H&C Investment Holdings Pty Ltd [2023] NSWSC 1387

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Supreme Court of New South Wales

Williams J

Evidence - H&C Investment Holdings Pty Ltd carried on a property development business as trustee for the H&C Unit Trust - there was a dispute about the amounts to be paid to various directors and/or shareholders way of final distribution of the profits of the company and the trust - certain shareholders and/or directors commenced proceedings against certain other shareholders and/or directors - the plaintiffs sought to rely on two affidavits of one of the plaintiffs and two affidavits of another of the plaintiffs - the defendants required each of these deponents for cross-examination, but the deponent plaintiffs did not attend Court for that purpose - the plaintiffs applied for cross-examination to be conducted by AVL from China, but the Court rejected this, as the plaintiffs had failed to adduce evidence capable of satisfying the Court that it was in the interests of the administration of justice for the evidence to be given by audio visual link because, having regard to the provisions of s5C of the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW), there was a risk that the Court would impinge on the sovereignty of the People's Republic of China if it were to take the evidence by AVL, and the expert report tendered by the plaintiffs had not addressed that question - the plaintiffs then applied for an order under r35.2 of the *Uniform Civil Procedure Rules 2005* (NSW) permitting the plaintiffs to tender or read their affidavits, notwithstanding that they would not attend for cross-examination, on the basis that the plaintiffs had taken all reasonable steps to secure their attendance, and that the two deponent plaintiffs were therefore "not available" to give evidence within the meaning of s63(1) of the *Evidence Act 1995* (NSW) - held: the plaintiffs had not demonstrated that they had taken all reasonable steps to secure or facilitate the deponent plaintiffs' attendance - on the contrary, one plaintiff failed to apply for a visa to enter Australia until less than four weeks before the commencement of the final hearing, and failed to include in that application any information about her role in these proceedings in connection with the purpose of her proposed visit, and failed to include any information in a form accessible to the Minister's delegate about her financial status and circumstances in China - there was no evidence that the other deponent plaintiff made any request or application for the return of his passport for the purpose attending court to give evidence in these proceedings in which he is a plaintiff - application to rely on the affidavits refused.

[View Decision](#) (I B)

Carnegie v Nelson-Carnegie [2023] NSWSC 1379

Supreme Court of New South Wales

Elkaim AJ

Contracts - the parties married in 1990 and separated in 2008 - during the marriage, they created a number of corporate entities - in 2010, the parties executed a financial agreement under Part VIIIA of the *Family Law Act 1975* (Cth), with the intent of splitting the parties' assets (including the assets of the companies) equally between them - the husband moved to New Zealand and wished to wind up each of three companies, as contemplated by the financial agreement - in 2021, the parties executed a term sheet prepared by the wife's accountants, which stated it was intended to be legally binding, which provided unfranked dividends from a

Benchmark

company to a family trust, and then a trust distribution to the husband - the term sheet also provided that the husband had the option to request future distributions from the trust, to be indirectly funded from conduit foreign income of the company, and to the extent that the amounts did not exceed the husband's 50% share of the relevant monies - conduit foreign income is income earned outside Australia by an Australian company, and, if the entitlement to that income is in turn held by a person who is not a resident of Australia (such as the husband who now lived in New Zealand) then the taxation laws allowed for a conduit of the funds from the foreign source, through Australia and on to the husband, thus creating an exemption from holding tax in Australia - the husband sought to request such further distributions, but the wife did not cooperate - the husband commenced proceedings - held: the first issue was jurisdiction, and the Court's initial reaction to the summons was that it concerned a "matrimonial cause" as defined in s4 of the *Family Law Act*, which would mean that the Supreme Court did not have jurisdiction, that jurisdiction having been extinguished by a proclamation in 1976 - the most apparently applicable definition of a matrimonial cause was that in paragraph (ca)(i) of the definition, namely "proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings: (i) arising out of the marital relationship!" - in this case, the proceedings were between parties to a marriage, and they concerned property of the parties - however, the current proceedings had been brought to enforce the term sheet, not any order made in the Family Court - given that the term sheet had been executed 11 years after the financial agreement was registered in the Family Court, the Court was satisfied that the proceedings arose out of the term sheet and not out of the marital relationship - the proceedings were not a matrimonial cause, and the Supreme Court therefore had jurisdiction - the issue of conduit foreign income was also initially of concern to the Court because the Court should not sanction any form of tax avoidance - however, the Court was persuaded on the evidence that that was not the case here, and noted that the ATO will take such measures as it thinks appropriate should it have a different view - the wife had failed to comply with her legal obligations under the term sheet - theoretically, damages may be an adequate remedy, but seeking such damages would take enough time to deny the husband the tax exemption - although this might be said to simply increase the damages, the Court preferred to approach the matter on the basis that damages would not be an appropriate remedy - wife ordered to specifically perform under the term sheet.

[View Decision](#) (I B)

Rosehill T1 Pty Ltd v Noah's Rosehill Waters Pty Ltd [2023] WASC 425

Supreme Court of Western Australia

Forrester J

Corporations - Noah's Rosehill Waters Pty Ltd was a property development company whose primary activity was the development of the Rosehill Estate in South Guildford - it defaulted on a \$45million financing facility, and the lender appointed administrators, who reported that certain former directors may have breached their directors' duties under s180, s181, s182, s184, and s286 of the *Corporations Act 2001* (Cth) - a deed of company arrangement was put in place - the plaintiffs were members or former members of Noah's Rosehill Waters, who had lent money

Benchmark

to the company and ranked second in entitlement to proceeds from the Rosehill Estate development, behind the provider of the facility - the plaintiffs sought an order under s247A of the *Corporations Act* to enable them to inspect the books Noah's Rosehill Waters - they sought to inspect, in respect of the relevant period: (i) profit and loss statements; (ii) payments made to the directors of Noah's Rosehill Waters Pty Ltd by way of dividend or any other payment; (iii) payments made from Noah's Rosehill Waters Pty Ltd to the development company; (iv) documents pertaining to the valuations over land owned by Noah's Rosehill Waters; (v) plans of subdivision of the land owned by Noah's Rosehill Waters; (vi) contracts between Noah's Rosehill Waters Pty Ltd and the development company for the development of the Rosehill Estate; and (vii) payments made to the provider of the facility under any mortgage - held: s247 provides that the Court may make an order authorising a member of a company to inspect books of the company, but only if the Court is satisfied that that the applicant is acting in good faith and that the inspection is to be made for a proper purpose - "books" are defined by s9 to include a register, any other record of information, financial reports or records, and a document - the stipulation that an application be made in good faith and for a proper purpose is a composite notion rather than two distinct requirements - good faith and proper purpose must be proved objectively, and the onus of proof is on the applicant - "proper purpose" means a purpose connected with the proper exercise of the rights of a shareholder as shareholder and not, for example, as a litigant in proceedings against the company or as a bidder under a takeover scheme - the issue raised by the applicant must be substantive, and not fanciful, artificial, specious, or contrived - pursuing a reasonable suspicion of breach of duty is a proper purpose - provided that the applicant's primary or dominant purpose is a proper one, it is not to the point that an inspection might benefit the applicant for some other purpose - the evidence here went no further than establishing a desire on the part of the plaintiffs to know what was happening with the finances of the defendant and where any money generated by its operations were being spent, and fell considerably short of establishing any case for investigation, or any basis for a reasonable suspicion of breaches of directors' duties - the Court was not satisfied that the plaintiffs had established that they were acting in good faith and the inspection was for a proper purpose - the mere fact that Noah's Rosehill Waters had a director in common with the development company did not establish any case for investigation - application dismissed.

[Rosehill T1 Pty Ltd](#) (I B C)



Poem for Friday

There may be chaos still around the world

By: George Santayana (1863-1952)

There may be chaos still around the world,
This little world that in my thinking lies;
For mine own bosom is the paradise
Where all my life's fair visions are unfurled.
Within my nature's shell I slumber curled,
Unmindful of the changing outer skies,
Where now, perchance, some new-born Eros flies,
Or some old Cronos from his throne is hurled.
I heed them not; or if the subtle night
Haunt me with deities I never saw,
I soon mine eyelid's drowsy curtain draw
To hide their myriad faces from my sight.
They threat in vain; the whirlwind cannot awe
A happy snow-flake dancing in the flaw.

George Santayana was born Jorge Agustín Nicolás Ruiz de Santayana y Borrás on December 16, 1863, in Madrid, Spain. He was raised in the USA from the age of 8 and was educated at the Boston Latin School and Harvard College. He studied in Berlin, and was later a Professor of Philosophy at Harvard from 1889 to 1912. He was a novelist, poet, and philosopher. His books include *The Sense of Beauty* (1896) and his 5 volume *The Life of Reason*, and 4 volumes *The Realms of Being*. He was an atheist who described himself as an "aesthetic Catholic". His aphorisms include his description of fanaticism as "redoubling your effort after you've forgotten your aim", and phrases such as "Only the dead have seen the end of the war", "Those who do not remember the past are condemned to repeat it" and "A child educated only at school is an uneducated child". His quoted words also include "The world is not respectable; it is mortal, tormented, confused, deluded forever; but it is shot through with beauty, with love, with glints of courage and laughter; and in these, the spirit blooms timidly, and struggles to the light amid the thorns." He died on 26 September 1952.

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

George Santayana on Meaning in Life

<https://www.youtube.com/watch?v=s-o24oiQVvQ>

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