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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)

Schiff v Nine Network Australia Pty Ltd (No 3) (FCA) - defamation defendants refused leave to amend their defence as their proposed particulars of their justification defence were inadequate (I)

Cooper v Director of Public Prosecutions (NSW) (NSWCA) - Drug Court fell into jurisdictional error when terminating a diversion program after the offender had been charged with further offences and denied bail (B)

Payne trading as Sussex Inlet Pontoons v Liccardy (NSWCA) - the intoxication section in the *Civil Liability Act 2002* (NSW) was engaged, that the prohibition on awarding damages in that section did not apply, but the compulsory contributory negligence provision in that section did apply (I B)

183 Eastwood Pty Ltd v Dragon Property Development & Investment Pty Ltd (NSWCA) - a company that became aware a fraudster had changed the ASIC records, but was then slow in correcting those records, had thereby authorised the fraudster to bind the company (I B)

Re Estate Miletic; Strbik v Strbik (NSWSC) - will construed so that the right of grandchildren in one clause was subject to the primary gift to the deceased's daughter in another clause (I B)

Rodrigues v customOz Services Pty Ltd (NSWSC) - a "without prejudice" email sent during

a dispute was not a payment schedule for the purposes of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (I B C)

Re Wood (No 2) (VSC) - Court refused to approve compromise where there were competing wills and all affected persons had not consented to the compromise (B)

Zhang & Liu Investment Pty Ltd v Nando's Australia Pty Ltd (VSC) - summary judgment entered against franchisee after termination of franchise agreement upheld (I B)

Ghosh v Ghosh (VSCA) - application for leave to appeal refused regarding orders releasing a body for cremation and preserving the deceased's estate pending resolution of probate proceedings (I B)

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Summaries With Link (Five Minute Read)

Schiff v Nine Network Australia Pty Ltd (No 3) [2023] FCA 336
Federal Court of Australia
Jackman J
Defamation - the applicant sued the respondents over a television program and a newspaper article - Court decided certain imputations were conveyed - respondents sought leave to amend their defence - applicant resisted leave on the basis that the particulars of justification were defective, and that, even if all the pleaded particulars were proved at trial, the defence of justification would still fail - held: the power to strike out pleadings as disclosing no reasonable cause of action or defence is discretionary and should be employed sparingly and only in a clear case - r16.41 of the *Federal Court Rules 2011* (Cth) requires a party to plead the necessary particulars of each claim, defence, or other matter - the degree of particularity required depends on the circumstances of the case and the nature of the allegations - particulars supporting a defence of justification must be capable of proving the truth of the defamatory meaning sought to be justified - in order to prove the substantial truth of an imputation, the defendant must prove the truth of every material part of that imputation - this does not mean the defendant has to prove the truth of every detail of the words established as defamatory - the defence of substantial truth is concerned with the sting of the defamation - there was a degree of imprecision in the particularisation of the applicant's role in a bank, but the particulars were sufficiently specific and precise to enable the applicant to know the case he had to meet - other particulars concerned allegations the applicant had established his bank in tax havens - these particulars did not suggest that the alleged benefits to the applicant were not lawfully available under the laws of the relevant jurisdictions - these particulars did not provide a basis for an allegation the applicant actually knew the bank's customers would include tax evaders and other criminals as a matter of probability - other particulars alleged the applicant had expressed views about the legitimacy of taxation, and then sought to infer that he endorses tax avoidance, and that he knew his bank was a vehicle for the tax avoidance - none of the statements as particularised condoned or encouraged illegal conduct, as distinct from the lawful minimisation of tax liabilities and the expression of some political views - the defendants should not have leave to rely on their proposed further defence, but should have leave to re-plead, taking into account the Court's comments.
Schiff (I)

Cooper v Director of Public Prosecutions (NSW) [2023] NSWCA 65
Court of Appeal of New South Wales
White, Brereton, & Kirk JJA
Administrative law - the applicant pleaded guilty in the Drug Court and was sentenced to 27 months imprisonment - sentence was suspended to allow the applicant to commence a Drug Court program - the conditions of the program included that the applicant attend a group session every Friday as advised by his counsellor, and that he reside at a specified rehabilitation centre unless given permission to reside at another nominated address, and he

was to sleep there each night unless he had prior approval of the court or his case manager - the applicant was later arrested and charged with 41 new counts of dishonestly obtaining financial service advantage by deception - these offences had allegedly occurred before the applicant was convicted in the Drug Court - one of the charges concerned fraudulent application under a special disaster grant scheme in respect of bushfires where he had attended to attain grant money of $75,000 - other charges related to attempts to obtain money from that scheme and other and various charities, some of which attempts had been successful - the applicant was refused bail and held in custody - the Drug Court terminated the applicant's program on the DPP's application - the applicant sought judicial review of the Drug Court's decision - held (White J dissenting): s10(1) of the *Drug Court Act 1998* (NSW) provides that the Court may terminate a program if it is satisfied on the balance of probabilities that an offender has failed to comply with the program, and that the offender is unlikely to make any further progress in the program or the offender's further participation in the program poses an unacceptable risk to the community that the person may re-offend - the Drug Court had properly been satisfied that, because the applicant was detained without bail, he had failed to comply with his program - this satisfied the first limb under s10(1) - however, the Drug Court had then focused on whether it was appropriate to deal with the new charges through the reversionary Drug Court procedures - the Drug Court should have focussed on whether the applicant was unlikely to make further progress in his program, or had posed an unacceptable risk to the community by continuing in the program - the Drug Court had thereby misconceived the nature of its power under s10(1), and had therefore constructively failed to exercise its jurisdiction and had fallen into jurisdictional error - order terminating the program set aside, and the DPP's application to terminate the program remitted to the Drug Court to determine according to law.
View Decision (B)

Payne trading as Sussex Inlet Pontoons v Liccardy [2023] NSWCA 73
Court of Appeal of New South Wales
Brereton & Beech-Jones JJA, & Basten AJA
Negligence - Liccardy sued both the owner and the master of a pontoon style boat in negligence - a hat belonging to one of the members of Liccardy's party was blown into the water, and Liccardy dived into the water to retrieve it - the master brought the boat around to allow Liccardy to climb back aboard using a ladder at the stern - as Liccardy swam to the ladder, his leg was struck by a propeller and he suffered two lacerations - Liccardy had consumed about four cans of full strength beer, had partly consumed a fifth can, and had consumed two lines of cocaine - the primary judge rejected the boat owner's reliance on s50(1) of the *Civil Liability Act 2002* (NSW), as he was not satisfied Liccardy was so intoxicated that his capacity to exercise reasonable care and skill was impaired within the meaning of that section - the appellant appealed - held: s50(1) provides that s50 applies if Liccardy was intoxicated to the extent that his capacity to exercise reasonable care and skill was impaired - s50(2) provides that, if s50 applies, a court is not to award damages unless satisfied that the injury was likely to have occurred even if Liccardy had not been intoxicated - s50(3) provides that, if the court is satisfied that the injury was likely to have occurred even if Liccardy had not been intoxicated, it must

presume that Liccardy contributorily negligent unless satisfied that the intoxication did not contribute in any way to the injury - s50(4) provides that, where there is a presumption of contributory negligence, the Court must reduce damages by at least 25% - swimming to the stern of the boat where the propeller was located to climb a ladder required the exercise of reasonable level of judgment - the unchallenged expert evidence was that Liccardy's capacity to exercise reasonable care and skill would have been impaired - the primary judge had therefore erred, and s50(1) had the effect that s50 applied - the Court proceeded on the basis of the parties' assumption that the appropriate test under s50(2) is an objective test on the balance of probabilities, without deciding this issue - it was more probable than not that Liccardy's injuries would have occurred even if he had not been intoxicated, so s50(2) did not apply - however, Liccardy had not established that his intoxication had not contributed in any way to his injury - someone who was not intoxicated in the same position may well have swum further away from the propellers - therefore s50(3) applied - a reduction of damages by 30% was appropriate (Brereton JA would have made a reduction of 25%) - parties to attempt to agree on orders giving effect to the Court's reasons for judgment, and to file competing orders and submissions if unable to agree.
View Decision (I B)

183 Eastwood Pty Ltd v Dragon Property Development & Investment Pty Ltd [2023] NSWCA 72
Court of Appeal of New South Wales
Bell CJ, Ward P, & Leeming JA
Agents - the appellant was the trustee of the Eastwood Unit Trust, through which unit holders invested in the development of a property at Eastwood - a fraudster lodged ASIC forms stating he was the sole director, secretary, and shareholder of the trustee, without the knowledge or approval of the trustee - the ASIC register was changed to reflect this incorrect information - the trustee later became aware of the fraud, and that the fraudster had raised about $4 million by way of mortgage over the Eastwood property - however, unknown to the trustee, the fraudster was also negotiating with Dragon about investing in the Eastwood property - the fraudster (purportedly on behalf of the trustee) and Dragon executed a deed under which 19 units in the unit trust were to be transferred to Dragon - Dragon paid the purchase price to a bank account in the name of the trustee but controlled by the fraudster - after this, and 116 days after the trustee had discovered the fraud, the trustee had the ASIC register corrected - Dragon sued the trustee and the fraudster - proceedings against the fraudster were discontinued when he became bankrupt - the primary judge found the trustee had held the fraudster out as having authority to bind the company, as a result of its failure to correct the ASIC register - the trustee appealed - held: both parties had known that the available AISC information had shown the fraudster to be the director and shareholder of the trustee, and that this would suggest he had authority to bind the trustee - the fact that the trustee had not known of Dragon's existence was irrelevant - the trustee knew the fraudster had already held himself out as someone who could bind in the company, as he had already done so in relation to the mortgage - a reasonable person in Dragon's position would expect that, if the trustee were aware of false information that

a fraudster had already exploited, the trustee would correct the information within a reasonable time - the primary judge had been correct to find the trustee had made a representation by its failure to take steps to correct the ASIC register - if it is the case that a duty has to be established for an omission to constitute a representation, then a duty to speak out was established - the lack of a statutory obligation to speak out was irrelevant - appeal dismissed.
View Decision (I B)

Re Estate Miletic; Strbik v Strbik [2023] NSWSC 371
Supreme Court of New South Wales
Lindsay J
Construction of wills - deceased left a will - cl5 left his estate to his two daughters - cl6 was ambiguously drafted, but might have meant that his grandchildren could acquire an interest in their parent's share when the youngest attained 21 years - one of the daughters had children, both of whom had attained 21 years - there was litigation between the two daughters which was settled by a deed of settlement - one of the grandchildren filed a cross-claim in those proceedings, relying on cl6 - held: the fundamental rule in construing a will is to give the words used the meaning the testator intended, having regard to the terms of the will - the question is not what the testator meant to do, but what the words the testator used mean - that is, the Court seeks the "expressed intentions" of the testator - the Court's first task is to determine, if it can, the deceased's basic scheme for dealing with his estate - the Court should then construe the will, if possible, to give affect that scheme - evidence of the surrounding circumstances is admissible - the Court may receive evidence of the deceased's knowledge of persons of things - the will must be construed as a whole - the primary provision of the deceased's will was that set out in cl5, which conferred on each of his daughters a vested interest in a one-half share of his assets - cl6 ostensibly mandated that the daughter with children set up a fund for those children - the tension between the clauses should be resolved by recognition that the fund set up under cl6 was not necessarily to be the whole of the relevant daughter's share - the obligation on that daughter under cl6 was largely left to her discretion - she was under no obligation to identify any funds within her entitlement to constitute the fund - the entitlement of the grandchildren was contingent upon that daughter setting up and maintaining a fund - orders made that, on the proper construction of the will, the grandchildren had no right, title, or interest in the deceased's estate.
View Decision (I B)

Rodrigues v customOz Services Pty Ltd [2023] NSWSC 379
Supreme Court of New South Wales
Rees J
Security of payments - a builder contracted to do renovation work at the plaintiffs' home in Bowral - the builder issued invoices and a dispute arose, leading to extensive correspondence and the involvement of an arbitrator/mediator nominated in the contract - as requested during the dispute process, the builder consolidated his invoices into a final invoice - the final invoice was stated to be a payment claim under the *Building and Construction Industry Security of*

Payment Act 1999 (NSW) - the plaintiffs did not serve a payment schedule, or at least did not serve anything explicitly claiming to be a payment schedule - the builder applied for adjudication“ the adjudicator found for the builder and valued the work at about $60,000 - the plaintiffs brought proceedings to quash the adjudication determination - the plaintiffs contended a "without prejudice" email they had sent during the dispute had been a payment schedule within the meaning of s14 of the Act - held: a payment schedule must identify the payment claim to which it relates, the amount of payment proposed to be made, and, if that amount is less than the amount claimed, why that is so - these requirements are "relatively undemanding" and satisfied when the document identifies the claim to which it responds, what parts of the claim are accepted, what parts are objected to, and why - the courts should approach this as a question of substance rather than form, and should not take an overly critical approach - a payment schedule must sufficiently describe the dispute to enable the claimant to determine whether to proceed in the knowledge of the nature of the case it will have to meet - the without prejudice email had identified the payment claim - however, the email had not said what amount of the payment claim the plaintiffs proposed to pay - most importantly, the email had not said why the amount offered was less than the amount claimed, beyond stating that the plaintiffs were confused with the series of invoices - this would not have enabled the builder to understand the nature of the case it would have to meet if it proceeded further - the plaintiffs had not regarded the without prejudice email as a payment schedule at the time they sent it - the fact that the email was marked "without prejudice" argued strongly against it being a payment schedule - that marking indicated that the email's purpose was to attempt to negotiate a settlement of the dispute on a confidential basis and without admission - the without prejudice email did not satisfy s14 of the act - application dismissed.
View Decision (I B C)

Re Wood (No 2) [2023] VSC 163
Supreme Court of Victoria
McMillan J
Probate - deceased left a last will appointing the plaintiff as executor and leaving her the residue of his estate - there was an earlier will appointing the deceased's niece and her husband as executors, and giving the residue of his estate to two great nieces - one of the great nieces (by a litigation guardian) lodged a caveat against probate, and alleged the deceased had lacked testamentary capacity at the time of the last will and did not know and approve of that will - the plaintiff and the caveator settled on terms that were subject to the approval of the Court under Order 15 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) - the agreement was that, following the Court's approval, the caveator would withdraw the caveat and the plaintiff as executor would administer the estate according to a schedule of payments set out in the terms of settlement - held: contested probate proceedings may be compromised where the validity of a will is disputed - the caveator was not party to the proceedings - the proposed order applied to the plaintiff as executor and would require her to distribute the estate in that capacity - the plaintiff could not compromise a dispute about the validity of the wills without the consent of all affected persons, or an order of the court binding all affected persons - the caveator had given

notice to the affected persons under the earlier will - however, until the caveator established a prima facie case, it was difficult for affected persons to respond with any clarity - further, notice needs to be given of all issues - the executors under the earlier will did not consent and the other great niece had not responded to the notice - the plaintiff's ability to consent to the compromise as sole beneficiary of the last will did not give her authority to compromise as executor - this was because the challenge to the last will casts doubt on the identity of the true executor and beneficiaries, and so the consent of all affected persons is needed - further, the Court must be satisfied by evidence that the will in respect of which probate is granted was valid - here, although the orders sought implied that the last will is valid, the Court would have to be satisfied by evidence that it was duly executed - the caveator was yet to establish a prima facie case and remained a mere caveator - if the caveator were joined as a defendant, the validity of the last will could be determined and the Court may then be in a position to approve the compromise - summons seeking approval of the proposed compromise dismissed.
Re Wood (No 2) (B)

Zhang & Liu Investment Pty Ltd v Nando's Australia Pty Ltd [2023] VSC 199
Supreme Court of Victoria
Lyons J
Contract - Zhang was the franchisee of a Nando's restaurant - the franchise agreement terminated by effluxion of time - Nando's exercised its right under cl18 of the franchise agreement to continue to operate the restaurant - the plaintiff sued Nando's, claiming the cost of refurbishment undertaken on the basis of allegedly misleading representations, the value of its assets in the restaurant at the end of the franchise, unconscionable conduct/unjust enrichment, and the loss of income caused by Nando's directing it to offer products at a discounted price - Nando's sought summary judgment - the primary judge found the asset valuation claim had no real prospect of success, which meant that the unconscionable conduct/unjust enrichment claim also had no real prospects of success, and granted summary judgment in respect of those claims - the primary judge held Zhang should have leave to replead the other claims - the primary judge found cl18 applied whether the franchise agreement was terminated by the actions of the parties of by effluxion of time - Zhang appealed against the summary judgment - Zhang sought to replead the rejected claims in *quantum meruit* - held: the principal issue was whether the primary judge erred in finding cl18 applied to termination both by action of the parties and by effluxion of time - this required the Court to construe cl18 - the *contra proferentem* is now regarded as a rule of last resort - courts should struggle with the words actually used, and reach their own conclusions by reference to logic, rather than applying mechanical formula - the word "termination" in clause 18 should be interpreted in the light of its context, and should be given a businesslike interpretation, given the parties were commercial entities - on its proper construction, clause 18 applied to terminations arising from both the actions of the parties and by effluxion of time - given this finding, no claim in *quantum meruit* could be maintained - a *quantum merit* claim cannot be inconsistent with the allocation of risk established by the contract - this would ordinarily require the appeal to be dismissed - however, the Court was concerned that an injustice could arise if Zhang were prevented from bringing a

claim in connection with the valuation process required under cl18 - Zhang should have a chance to apply to further amend its statement of claim - if Zhang did not do so, the Court stated its intention to dismiss the appeal.
Zhang & Liu Investment Pty Ltd (I B)

Ghosh v Ghosh [2023] VSCA 77
Court of Appeal of Victoria
J Forrest AJA
Probate - one of two brothers alleged their mother had been "systematically murdered" in hospital - the Coroner concluded the death was not a reportable death and released the body - the brother disputed the Coroner's findings and the body being released - the other brother then made an application for probate, and sought interim orders for release of the body for cremation, and for the preservation of the mother's estate - he propounded a will naming both brothers as co-executors - first brother asserted this will was fraudulent and relied upon a subsequently obtained unsigned draft will - the primary judge granted the second brother's interim application and ordered the body released for cremation and the first brother to be restrained from a disposing of any of the mother's assets, including the family home - the first brother sought leave to appeal to the Court of Appeal - the second brother did not participate in the hearing of the application for leave - held: the first brother sought to agitate many issues which would be determined later at trial - the first brother had confounded the issues regarding the release of the body with the issues regarding probate - the Court has power to make orders in relation to the disposition of a body under both its inherent jurisdiction and r54.02 of the Supreme Court (General Civil Procedure) Rules 2015 (Vic) - the primary judge had followed an established line of authority as to the Court's powers - the second brother had both standing and sufficient interest to commence the probate proceedings - the first brother had not been denied procedural fairness - in this case, the potential benefits to the administration of justice in investigating a death did not justify allowing the mother's body to deteriorate further before cremation, particularly over the wishes of another family member - the first brother had demonstrated an ability to use the estate's funds, therefore it was important that the status quo be maintained until determination of the probate proceedings - the orders made by the primary judge were appropriate - application for leave to appeal dismissed.
Ghosh (I B)

Poem for Friday

To My Dear and Loving Husband

By: Anne Dudley Bradstreet (1612-1672)

If ever two were one, then surely we.
If ever man were loved by wife, then thee.
If ever wife was happy in a man,
Compare with me, ye women, if you can.
I prize thy love more than whole mines of gold,
Of all the riches that the East doth hold.
My love is such that rivers cannot quench,
Nor ought but love from thee give recompense.
Thy love is such I can no way repay;
The heavens reward thee manifold, I pray.
Then while we live, in love let's so persever.
That when we live no more, we may live ever.

Anne Dudley Bradstreet, born 8 March 1612, in Northampton England, was the first English poet to be published in the New World (North America). She was well educated by her father Thomas, who was described as a "devourer of books". He was the steward to the Earl of Lincoln from 1619 to 1630 and Anne Bradstreet read in the Earl's library. She studied languages, theology, politics, philosophy, history, medicine, and literature. In the Elizabethan Era education for women was valued. She married at 16 to Simon Bradstreet. She immigrated to the New World with her parents and husband in 1630 and had 8 children. The Bradstreets were one of the most prominent Puritan families in the New World. Her father and husband were at different times governors of the Massachusetts Bay Colony. Her poetry suggests that she rebelled somewhat against the Puritan life in New England and questioned her faith. Her poetry deals with the issues of death, her role in the world, salvation, and eternal life, while living in a time when her compatriots in the frontier towns of the New England area were experiencing great poverty, hunger, disease, and early death, including in childbirth. Anne Bradstreet also wrote poems to her husband, describing their great love. She and other female Puritan writers faced opposition from some members of the clergy.

King George III was said to have had a copy of Anne Bradstreet's book of poetry, *The Tenth Muse Lately Sprung up in America,* published in 1650, in his library. The book was included in 1658 in the *Catalogue of the Most Vendible Books in England.* Anne Dudley Bradstreet died on 16 September 1672, in Andover, Massachusetts Bay Colony. In 1692, her son, Dudley Bradstreet, a Justice of the Peace for the Essex County, refused to issue any further warrants for the arrest of "witches" during the Salem witch trials, and as a

result was himself accused of witchcraft and murder, with his wife Anne. After going into hiding, for a period, he later returned and was a Justice of the General Court of Boston.

Alyssa Milano, actress, reads “To My Dear and Loving Husband”
https://www.youtube.com/watch?v=HbQRMbJmx5g

Dame Helen Mirren reads “To My Dear and Loving Husband
https://www.youtube.com/watch?v=qU82qY6etWw

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