AR CONOLLY & COMPANY
LAWYERS

Benchmark

Friday, 21 July 2023

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)

Wreck Bay Aboriginal Community Council v Commonwealth of Australia (No 2) (FCA) - the Court explained the operation of limitation periods with respect to class actions, and granted a documentary maker access to certain materials relevant to the settlement of the proceedings (I B)

Elite Realty Development Pty Ltd v Sadek (NSWCA) - a party who had entered into a termination agreement for a joint venture under duress could not rescind because he had affirmed the termination agreement by accepting the money due to him under the agreement, resigning his directorship, and transferring his share in the joint venture vehicle (B C I)

Luck v Workers Compensation Nominal Insurers & Ors (NSWSC) - Personal Injury Commission Appeal Panel fell into jurisdictional error by (properly) rejecting an additional statement propounded by the plaintiff, but then relying on the fact that the plaintiff was capable of preparing such a statement to make inferences regarding her cognitive ability (I)

Hunt Leather Pty Ltd v Transport for NSW (NSWSC) - businesses effected by the prolonged construction of the Sydney Light Rail from Circular Quay were entitled to succeed against Transport for NSW in private nuisance (B C I)

Hawkesdale Asset Pty Ltd & Anor v Bennett (VSC) - licence agreement to enter land and construct wind turbines - owner had unreasonably refused consent to an assignment of the

licensee's interest, as his purpose was to oppose the entire project, which was extraneous to the purpose for which his right to withhold consent was granted (I B C)

HABEAS CANEM

Country Boy

Summaries With Link (Five Minute Read)

Wreck Bay Aboriginal Community Council v Commonwealth of Australia (No 2) [2023] FCA 811
Federal Court of Australia
Lee J
Representative proceedings - the Court had previously approved settlement of a class action under s33V(1) of the *Federal Court of Australia Act 1976* (Cth) - the Court considered that a further explanation of the effect of the settlement regarding limitation of actions was required, and a production company making a documentary concerning per - and polyfluoroalkyl contamination at Wreck Bay sought access to certain materials in the proceeding - held: as the Court had previously explained, the proposed settlement did not prevent claims being brought by those who may allege in future they have suffered personal injury arising from alleged wrongful conduct of the Commonwealth - the individual claim of a group member comprises the entire justiciable controversy between that group member and the respondent or respondents in a class action - upon the commencement of a representative proceeding, s33ZE of the *Federal Court of Australia Act* provides that any limitation period applicable to the claim of the group member to which the proceeding relates is suspended - upon the Court approving the discontinuance of a representative proceeding, the respondent is left in the position that the limitation applicable to the group member's claim will remain suspended, and the respondent will thereafter be exposed to the risk of claims by group members - as it is unlikely the legislature intended such a result, a practice has arisen whereby, upon a discontinuance, orders are made pursuant to s33ZF of the *Federal Court of Australia Act* such that the relevant limitation periods begin to run from a particular point in time - this is a matter in respect of which group members should obtain legal advice - as to the non-party request, information that is not in the public domain and is obtained by compulsory process cannot be used for a collateral or ulterior purpose unrelated to the proceeding in which the information was obtained - the restriction comes to an end once a document is tendered in evidence or formally read in open court - the operation of these principles does not prevent the Court granting a non-party access to additional material if the Court is of the view that it is appropriate to do so in all the circumstances - apparent misapprehension and misinformation was reflected in a number of objections to the proposed settlement - the Court was acutely conscious of the need to ensure that accurate information concerning this settlement is conveyed - the party seeking access was is a responsible documentary maker, and had volunteered an agreement with the Court to provide the Court with a transcript of the relevant parts of the documentary in advance to ensure it does not engender any further confusion about the nature of the settlement to group members - access granted.
Wreck Bay Aboriginal Community Council (I B)

Elite Realty Development Pty Ltd v Sadek [2023] NSWCA 165
Court of Appeal of New South Wales
Payne, Mitchelmore, & Stern JJA

Duress - Afyouni and Sadek formed a joint venture to develop property in Maroubra - they incorporated Elite Realty Development Pty Ltd and Maroubra Road Development Pty Ltd - after a disagreement, Afyouni changed the settings to Elite's bank accounts so that both he and Sadek had to consent to withdrawals - this caused problems with paying subcontractors - one of the subcontractors threatened Afyouni with a gun and demanded he unblock the bank account - Afyouni complied - Afyouni and Sadek then agreed to terminate the Maroubra joint venture, on the basis that Afyouni would relinquish his directorship and ownership of Maroubra Road Development and receive $700,000 - Sadek had also incorporated a separate company which bought properties at Matraville and Condell Park - Afyouni and Elite sued, alleging their entry into the termination agreement was procured by duress (the gun incident) and also alleged that the Matraville and Condell Park properties had been bought with joint venture funds - they also alleged that Sadek had improperly terminated another joint venture at Avoca - the primary judge found Sadek either procured the gun attack or acted in a common design with the attacker - however, Afyouni could not rescind the termination agreement because, although he had entered that agreement under duress, he later affirmed the agreement by performing it once the duress had ended - the primary judge also found that the purchases of the Matraville and Condell Park properties were funded with bank loans, were not intended to fall within the Maroubra joint venture, and were not bought with joint venture funds - the primary judge also found that Sadek had not terminated the Avoca joint venture - Afyouni and Elite appealed - held: Sadek and the other respondents had sufficiently pleaded their affirmation defence - Afyouni and the other appellants were on notice that Sadek relied on affirmation - an agreement is voidable if illegitimate pressure was applied by someone who intends to compel the person to enter into the agreement - it is not necessary for the will of the victim to be overborne; it is a matter of the will being deflected, not destroyed - the test for a plaintiff relying on duress is objective: was it reasonable for the person alleging duress to believe that the person engaging in the wrongful conduct would take the action foreshadowed? - affirmation may occur when the person under duress performs the voidable contract with knowledge of the circumstances after escaping from the duress and taking no steps to set aside the agreement - the primary judge did not err in finding that Afyouni was no longer under duress when performing the termination agreement - Afyouni's post-traumatic stress disorder diagnosis did not constitute duress - the primary judge did not err in rejecting Afyouni's evidence that he remained in fear of Sadek while performing the termination agreement - the primary judge did not err in finding that Afyouni had affirmed the termination agreement by accepting the $700,000 due to him under the agreement, by resigning his directorship of Maroubra Road Development, and by and transferring his shares - the primary judge had been correct to find that that the Matraville and Condell Park properties had not been bought with joint venture funds - the primary judge had not erred in finding that Sadek had not terminated the Avoca joint venture - Afyouni could not argue that Sadek's conduct falling short of legal termination amounted to a breach of duty, as this was inconsistent with his case at first instance - appeal dismissed.
View Decision (B C I)

Luck v Workers Compensation Nominal Insurers & Ors [2023] NSWSC 842

Supreme Court of New South Wales
Weinstein J
Workers compensation - Luck was employed in an information technology role that included project management duties - she claimed to have been harassed and bullied by co-workers and management, and to have suffered workplace psychiatric injury as a result - an approved medical specialist certified her WPI at 7% - the plaintiff later discovered that her husband was involved in an extra-marital affair and her marriage broke down - she then filed an Appeal Against Decision of Medical Assessor on pursuant to s327 and s328 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) in the Personal Injury Commission Workers' Compensation Division - a delegate of the President of the Commission referred the appeal to an Appeal Panel for determination in accordance with s327(4) of the Act - the Appeal Panel refused to admit Luck's additional statement concerning the breakdown of her marriage and making criticisms of the way the original assessment was conducted - the Appeal Panel dismissed the appeal - Luck sought judicial review of the Appeal Panel's decision - held: it was open to the Appeal Panel to reject the plaintiff's additional statement - the evidence of the marriage breakdown was neither evidence of a deterioration (s327(3(a)) nor additional relevant evidence (s327(3)(b)) - the relationship between that breakdown and the workplace injury was, "on a generous view", unclear - the Appeal Panel engaged with Luck's articulated case, and it was not to the point that it extracted portions of the approved medical specialist's findings with which it agreed - however, the Appeal Panel had stated that Luck was clearly capable of "typing a long document", and the additional statement, and did not demonstrate any cognitive difficulties in so doing - the Appeal Panel, having rejected the additional statement, as it was entitled to do, ought not to have relied upon it at all - having rejected the additional statement, it was impermissible for the Appeal Panel to make any assumptions or express any conclusions or opinions arising from the making of the statement - decision of Appeal Panel quashed, certificate of determination set aside, and the appeal remitted to the President of the Personal Injury Commission for referral to a differently constituted Appeal Panel for determination according to law.
View Decision (I)

Hunt Leather Pty Ltd v Transport for NSW [2023] NSWSC 840
Supreme Court of New South Wales
Cavanagh J
Nuisance - Transport for NSW was the NSW Government agency which planned, designed, and managed the construction of the Sydney Light Rail from Circular Quay to Randwick and Kensington - major roads including George Street were closed during construction - construction was prolonged for over a year beyond that contemplated, and many business suffered adverse effects - a CBD business and a Kensington business, and their principals, commenced representative proceedings against Transport for NSW on behalf of all persons who had suffered from either private nuisance or public nuisance during construction - a hearing took place to determine liability to the lead plaintiffs, damages, and agreed common questions relevant to other group members - held: to succeed, the plaintiffs had to establish an

interference with their land that constituted a legally actionable nuisance, and that Transport for NSW was liable for that nuisance - there are three types of interference with land constituting nuisance: (1) causing encroachment short of trespass on the neighbour's land; (2) causing physical damage to the neighbour's land; and (3) unduly interfering with a neighbour in the comfortable and convenient enjoyment of his or her land - this case was concerned with the third type - the plaintiffs had to show a substantial and unreasonable interference with their use of their land - in assessing reasonableness, the Court does not determine whether the defendant acted negligently or failed to take reasonable care - interference may be unreasonable even though the defendant took reasonable care, although this may be a relevant factor - nuisance is not two-tier tort, where uncommon or not ordinary use of land gives rise to strict liability, and common or ordinary use requires unreasonableness - fault is established if the defendant created the circumstances which led to the substantial and unreasonable interference, where that interference was foreseeable - s43A of the *Civil Liability Act 2002* (NSW) did not apply, as it merely sets the standard of care which applies in an action for a breach of a duty of care in the exercise of a statutory power - Transport for NSW knew that construction had the potential to, and was likely to, severely impact the businesses along the route - the interference was substantial and unreasonable and the plaintiffs would succeed, subject to establishing Transport for NSW should bear personal responsibility for the interference - given Transport for NSW's knowledge of the risk occasioned by the presence of utilities along the route, and the risk of interference with businesses, the delay and its effects were plainly foreseeable by Transport for NSW - this utilities risk was so high that the other party to the relevant project contracts was not prepared to accept it - Transport for NSW contracted on terms with the relevant contractors that provided relief to contractors in respect of the utilities risk, but provided no real deterrence for delay - during the course of the project, the relevant contractor discovered nearly as many unknown utilities as had been discovered before entry into the project agreements - the businesses succeeded in their claim for private nuisance - the claim in public nuisance failed, as s141 of the *Roads Act 1993* (NSW) applied - common questions answered - matter listed for further directions with a view to finalising damages and consider whether any further common questions should be answered.
View Decision (B C I)

Hawkesdale Asset Pty Ltd & Anor v Bennett [2023] VSC 409
Supreme Court of Victoria
Croft J
Contracts - Bennett entered into a licence agreement allowing the construction of wind turbines on his property - he ultimately became opposed to the project - the licensee then sought assign its rights under the licence agreement to a related company - under the licence agreement, this required Bennett's consent, which could not be unreasonably withheld - Bennett refused to engage with the licensee despite many attempts to communicate - the licensee and proposed new licensee ultimately commenced proceedings - due to Bennett's refusal to communicate at all, the Court ordered substituted service - Bennett did not respond to service, filed no pleadings or other documents, and took no part in the trial - the Court provided live streaming of the trial

and also provided Bennett with a remote access link, but Bennett did not engage with that link - held: Bennett's failure to communicate constituted either express or implied refusal to consent - in the context of a lease, the purpose of a covenant against assignment without the consent of the landlord is to protect the landlord from undesirable occupation or use of the premises - a landlord is not entitled to refuse consent on grounds extraneous to the relationship of landlord and tenant, having regard to the terms of the lease - the tenant bears the onus of proving consent has been unreasonably withheld - the landlord need not prove the conclusions that led to refusal were justified, if they were conclusions which might be reached by a reasonable person in the circumstances - a landlord may reasonably refuse consent based on the proposed purpose of the proposed assignee, even though that purpose is not forbidden by the lease - the benefit to the landlord in withholding consent might be so disproportionate to the detriment to the tenant that it is unreasonable to withhold consent - whether the landlord's consent was unreasonably withheld is a question of fact which depends on all the circumstances - the Court must discern the real and true reason for a landlord's refusal - if the landlord's main aim is to obtain a collateral advantage, for example, the surrender of the lease, then refusal is unreasonable - refusal would also be unreasonable if, in the circumstances, it amounts to a derogation from the grant comprised by the lease and an arbitrary and capricious attempt to deprive the tenant of a benefit under the lease - all of the above principles are equally applicable to licence agreements - Bennett's refusal was unreasonable having regard to the fact that the licensee and the proposed new licensee were related companies, that the licensee and its predecessors had complied with all relevant obligations under the licence agreement, the significance of Bennett's land to the project, Bennett's obligation to do all things necessary to give effect to the licence agreement, the licensee's willingness to guarantee the performance of the new licensee, and an offer to enter into new arrangements on terms favourable to Bennett - Bennett's real reason for withholding consent was that he no longer wished to have wind turbines constructed on his land - that purpose was extraneous to the purpose for which the right to withhold consent was granted, and permitting him to refuse consent for that purpose would entirely defeat, or render valueless, the licensee's right to assign - the Court should grant declaratory relief, which here was real, not theoretical - specific performance, in the form of an order requiring Bennett to consent to the assignment, or alternatively, an order under s22(1) of the *Supreme Court Act 1986* (Vic) directing the Prothonotary to provide such consent on Bennett's behalf, was also appropriate, as the licence agreement created an interest in the land, the land was critical to the project, and the licensee and proposed new licensee would suffer substantial damages if not granted access to the land - injunctive relief was also granted restraining Bennett from refusing access to the land.
Hawkesdale Asset Pty Ltd & Anor (I B C)

Poem for Friday

Come, Rest Awhile

By: Lucy Maud Montgomery (1874-1942)

Come, rest awhile, and let us idly stray
In glimmering valleys, cool and far away.

Come from the greedy mart, the troubled street,
And listen to the music, faint and sweet,

That echoes ever to a listening ear,
Unheard by those who will not pause to hear

The wayward chimes of memory's pensive bells,
Wind-blown o'er misty hills and curtained dells.

One step aside and dewy buds unclose
The sweetness of the violet and the rose;

Song and romance still linger in the green,
Emblossomed ways by you so seldom seen,

And near at hand, would you but see them, lie
All lovely things beloved in days gone by.

You have forgotten what it is to smile
In your too busy lifecome, rest awhile.

Lucy Maud (L.M.) Montgomery, a much loved Canadian poet and writer, was the author of Anne of Green Gables. She was born on 30 November 1874 in Clifton, Prince Edward Island, Canada. Her parents ran the local post office out of their house. Her mother Clara died of tuberculosis at 23 years of age, before Maud turned two years of age. From the age of 10 she was cared for by her grandparents, and then aged 15, left school to care for her step-siblings when her father remarried. She submitted Anne of Green Gables to four publishers by 1904, when she was 30, and all rejected the work. She later married Rev. Ewen MacDonald, continuing writing poetry and articles. In 1908 Anne of Green Gables was published. She published her collection of poems, The Watchman and Other Poems in 1916, and published three small biographies Courageous Women in 1934. She is said to have written over one million works in her private journals during her life. She died on 24 April 1942 in Toronto, Ontario, and was buried in the Cavendish cemetery on Prince

Edward Island.

Read the Journal of L.M. Montgomery Studies, a collection of material from the L M Montgomery Institute's 13th Biennial Conference in 2018, at: https://journaloflmmontgomerystudies.ca/lmm-reading

Click Here to access our Benchmark Search Engine