

Friday, 24 May 2024

## 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)

**Purser v Purser** (NSWSC) - wife obtained orders that trustees for sale be appointed for property she jointly owned with her husband - costs to be paid out of the proceeds of sale - the mere fact that the wife needed to bring the application did not justify an indemnity costs order (B C I)

**McPhee v Steelsmith Engineering Pty Ltd** (VSC) - magistrate had erred in law in holding that s114E of the *Accident Compensation Act 1985* (Vic) did not entitle a worker to interest on arrears of weekly payments where an agreement to pay such arrears was made in settlement of litigation (I B)

**Bottoni v Young** (WASC) - application for interlocutory injunction dismissed as there was no serious question to be tried, in the sense there was no legal or equitable right or cause of action required to be determined at a final trial which was supportive of the injunctive relief sought (B I)

**Russo v Vernon Homes Pty Ltd (in liq)** (WASC) - leave granted for client to continue litigation against builder who had been placed in liquidation (B C I)

**Jess & Jess (No 5)** (FedCFamC1A) - orders for financial disclosure against third parties were not final orders merely because the third parties claimed the documents were confidential - grounds of appeal had no merit (I B)

## HABEAS CANEM

### Man and loyal dog



# Benchmark

## Summaries With Link (Five Minute Read)

### **Purser v Purser [2024] NSWSC 611**

Supreme Court of New South Wales

Peden J

Co-ownership of land - a husband and wife were joint tenants of real property - the wife sought orders under s66G of the Conveyancing Act 1919 (NSW) for the appointment of trustees for sale of the property - the wife claimed that she was concerned that the husband had been dealing with the property without consulting her, and that the husband had refused her suggestion that the property be sold to discharge the debt secured over it, and that she and her husband were unable to work together to manage and maintain the property - the wife sought her costs of the application on an indemnity basis, but abandoned the claim that those costs should come out of the husband's share - held: the parties were co-owners as defined in s66F(1) of the *Conveyancing Act*, but orders made under s66G for the appointment of trustees will not have the effect of severing a joint tenancy - although an order under s66G is discretionary, such an order is almost as of right, unless on settled principles it would be inequitable to make the order, for example if it would be inconsistent with a proprietary right, or the applicant for the order is acting in breach of contract or fiduciary duty, or is estopped from seeking or obtaining the order, and hardship or general unfairness is not a sufficient ground for declining to make the order - there was no basis in this case for a finding that it would be inequitable or contrary to any contractual arrangement to order the sale - the wife bore the onus to satisfy the Court that it was appropriate to depart from the usual order and award costs on an indemnity basis - in s66G cases, it is usual to order that the costs of the proceedings be paid out of the proceeds of sale, on the basis that the costs of such an application are an incident of joint ownership - the mere fact that the wife needed to bring a s66G application to compel the sale of the property did not justify an indemnity costs order - the wife had to establish that she had incurred unnecessary costs as a result of unreasonable conduct on the part of the husband - it had not been unreasonable for the husband to file an ordinary appearance in the proceedings and then shortly thereafter file a submitting appearance save as to costs - there was also no evidence that this course of conduct had caused the wife to incur additional costs - as the s66G order did not sever the joint tenancy, it would be necessary for the Court in due course to consider the appropriate division of the net proceeds, should the parties not agree on this.

[View Decision](#) (B C I)

### **McPhee v Steelsmith Engineering Pty Ltd [2024] VSC 254**

Supreme Court of Victoria

Daly AsJ

Workers compensation - the appellant worked as a welder for the respondent and sustained an injury to his left knee during the course of his employment as a result of a fall - he submitted a claim for this injury, which was accepted by the employer's claims agent - weekly payments were made under the *Accident Compensation Act 1985* (Vic) until they were terminated after

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130 weeks following a notice issued by the claims agent - the plaintiff sued in the Magistrates' Court seeking resumption of the weekly payments, and these proceedings were compromised on the basis that payments would continue for about a further eight months - while the agreement provided for the payment of arrears of weekly payments, it did not provide for interest on those arrears - the appellant filed a further amended statement of claim in the Magistrates' Court, seeking such interest - the primary magistrate dismissed this claim - the appellant appealed on a question of law - held: s114C of the *Accident Compensation Act* provides for the entitlement of a worker to prospective weekly payments and for the time from which prospective weekly payments must be paid to the worker, and s114C(2) provides that the time for payment for any outstanding weekly payments is the same time that payments of prospective weekly payments commence, and s114E is concerned with a worker's entitlement to outstanding weekly payments and interest on those outstanding weekly payments, and the period for which the worker becomes entitled to outstanding weekly payments and interest - s114E does not appear to contemplate a scenario whereby a worker is entitled to arrears of weekly payments for a defined period of time, but not interest on those outstanding weekly payments, or for interest in respect of a different period of time - that is, the entitlements to outstanding weekly payments and interest on those outstanding weekly payments travel together - while the Act does not define 'outstanding weekly payments', it was apparent from the scheme of s114E(1) that outstanding weekly payments are the cumulative amount of weekly payments not paid to a worker where it has been subsequently determined that the worker was in fact entitled to weekly payments for the relevant period - s114E(1) is a remedial provision, and should be construed beneficially - s114E(1) should not be viewed as providing for an entitlement to interest only in confined circumstances, but rather covers a range of scenarios where a worker may have been wrongfully denied weekly payments or had their entitlement to weekly payments wrongfully terminated or altered - the magistrate had misconstrued s114E(1)(b) by giving it a restricted meaning, and thus erred in law - appeal allowed.

[McPhee](#) (I B)

## **Bottoni v Young [2024] WASC 186**

Supreme Court of Western Australia

Lundberg J

Partnership - the parties were the partners of an orthodontic practice, who could not agree on the nature of the partnership, its precise terms, and whether it has been dissolve - the plaintiffs sought orders for the appointment of a receiver to the partnership and orders that the partnership be wound up on and from a particular date - the plaintiffs also sought urgent interlocutory relief to restrain the defendants from doing any acts or things which hinder, prevent, or frustrate the usual operation by the plaintiffs of an orthodontic practice at named premises, including, but not limited to, the entry into a new services and facilities agreement with the landlord dental practice on such terms as the plaintiffs see fit - the Court now determined the claim for interlocutory relief - held: the two main enquiries on an application for an interlocutory injunction are whether the plaintiff has made out a prima facie case and

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whether the balance of convenience favours the grant of the injunction - as stated by the High Court in *ABC v Lenah Game Meats Pty Limited* [2001] HCA 63; 208 CLR 199, it is important when considering an application for an interlocutory injunction to identify the legal or equitable rights which are to be determined at the trial and in respect of which final relief is sought - the justification for an interlocutory injunction is to maintain the status quo pending trial, and if the interlocutory injunction sought does not have a sufficient colour of right of the kind sought to be vindicated by final relief, there is no foundation to make the interlocutory injunction - unconscionability may play a role in determining the existence of the claimed right to final relief, but it cannot conjure up a right to interlocutory relief where there is no right to final relief - the plaintiffs here claimed an estoppel based upon the assumptions they had based on their own giving of notice of dissolution of the partnership - there is real uncertainty as to the manner in which the estoppel claim has been articulated by the plaintiffs, and the sole act identified to ground the estoppel claim was an act on the part of the plaintiffs and not the defendants - the plaintiffs had also identified no conduct by the respondents that would make departure from the assumed state of affairs unconscionable - assuming without deciding that promissory estoppel can operate as a positive source of legal rights, an acceptance of the plaintiffs' asserted position would nonetheless require the Court to push that principle beyond its breaking point - even if the estoppel and the assumed state of affairs contention were made out, the Court could not see the logical connection between those matters and the plaintiffs' claims in respect of being permitted to entry into a new services and facilities agreement with the landlord dental practice - there was no serious question to be tried, in the sense there was no legal or equitable right or cause of action which is required to be determined at a final trial which is supportive of the particular injunctive relief sought - application for interlocutory injunction dismissed.

[Bottoni](#) (B I)

## **Russo v Vernon Homes Pty Ltd (in liq) [2024] WASC 191**

Supreme Court of Western Australia

Master Russell

Insolvency - Russo as owner and Vernon Homes Pty Ltd as builder entered into a written residential building works contract to build a multi-storey residential construction - Vernon Homes failed to bring the works to be performed under the contract to practical completion by the time required under the terms of the contract - Russo served a default notice, and Vernon Homes failed to remedy the defaults within the time state, and Russo then terminated the contract and engaged a new builder to complete the building works - Russo commenced proceedings against Vernon Homes claiming the difference between what it cost to have the alternative builder complete the works and the amount that would have been payable to Vernon Homes under the contract - Russo also sued the director of Vernon Homes pursuant to a deed of guarantee between that director and Vernon Homes - Vernon homes then went into liquidation pursuant to a creditors' voluntary winding up - Russo sought leave pursuant to s500(2) of the *Corporations Act 2001* (Cth) to proceed with the action against Vernon Homes - the liquidator informed Russo's lawyer that he consented to leave being granted, and that, should leave be granted, he did not intend Vernon Homes to take an active role in defending the

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action - held: although the liquidator consented, s500(2) of the *Corporations Act* provides that, after the passing of a resolution for voluntary winding up, no action or other civil proceeding is to be proceeded with against the company except by leave of the court, and subject to such terms as the court imposes - the Court had required the plaintiff to file further evidence and he had filed an affidavit and outline of submissions - the Court invited the plaintiff to file further evidence in relation to any return to creditors of Vernon Homes, and the availability of any insurance, which the plaintiff had done - part of the purpose of the requirement for leave is to avoid a company in liquidation being subject to a multiplicity of time consuming and expensive actions - the discretion to grant or refuse leave is broad, and it is not possible or appropriate to attempt to state exhaustively the relevant considerations, but such relevant considerations would include the amount, seriousness, and nature of the claim, the degree of complexity of the legal and factual issues, and the stage the proceedings have reached - there must be no prejudice to the creditors, or to the orderly winding up of the company, before the action is allowed to proceed - Russo had demonstrated there was a serious question to be tried - the action as well advanced and was to be pursued promptly - there was no evidence of any prospect of surplus assets and no insurance cover for the claim, which would have been reasons to refuse leave - the Court was satisfied it was appropriate to grant leave to the plaintiff to proceed with the action against Vernon Homes, and also to order that the plaintiff not to execute any judgment entered against Vernon Homes without leave of the Supreme Court of Western Australia.

[Russo](#) (B C I)

## **Jess & Jess (No 5) [2024] FedCFamC1A 85**

Federal Circuit and Family Court of Australia (Division 1) Appellate Jurisdiction

Alstergren CJ, Austin, & Williams JJ

Financial disclosure - a wife sought financial relief against the deceased estate of her late husband under Part VIII of the *Family Law Act 1975* (Cth) - the wife also brought claims against other parties, including applications pursuant to s106B of the Act to set aside a trust deed, a deed of settlement, and the transfer of unit holdings, and claims in equity such as constructive trust, tracing, and the taking of accounts - the primary judge made orders for discovery of financial records against these other parties - they contended they could appeal against these discovery orders as of right, but also sought leave as a fall-back position - held: the financial disclosure orders were interlocutory, and leave was required - the orders were not final merely because they infringed a substantive right to privacy - the respondents' desire for confidentiality in the documents was not the same as the enjoyment of a right to confidentiality flowing from some type of legally recognised privilege or from contract - the Full Court has held that leave is needed even when orders compel disclosure of documents purportedly confidential under a legally recognised privilege such as public interest immunity or legal professional privilege, although the test for the grant of leave in such circumstances may not be applied so rigorously - a grant of leave ordinarily requires the decision at first instance be attended by sufficient doubt to warrant appellate scrutiny and that substantial injustice would result if leave were refused, supposing the decision to be wrong - the primary judge had not denied procedural fairness by stating a provisional view that it would be best to determine the respondents' application to

amend their defence before concluding the financial disclosure dispute, but then changing his mind - whether that decision was wise was not to the point - procedural fairness is concerned only with the fairness of the hearing, not with the fairness of the result - the test remains one of unfairness, not merely departure from a representation, and not every departure from a stated intention necessarily involves unfairness, even if it defeats an expectation - the primary judge was entitled to determine the financial disclosure dispute on the current state of the pleadings, which had been unchanged for nearly a year, and the amendment would likely have made no difference to the financial disclosure dispute - other grounds of appeal also lacked merit - the wife's pending claim for a proprietary interest in the trust units pursuant to Part VIII was, or may be, a sufficient foundation for her to trace the units and the income - further, the husband's legal personal representative and the husband's estate's trustees in bankruptcy both supported the tracing claims, and it was an artifice to distinguish between the parties who do and do not have a right to trace when those parties seek the same relief and mutually support the claim of the other - there was enough in the wife's pleadings to allege a *prima facie* case of fraud, but she needed documents to prove her case, and it was no answer for the respondents to refuse to give disclosure on the basis that circumstances of the existence of fraud had not yet been adequately pleaded - leave to appeal refused.

[Jess & Jess \(No 5\)](#) (I B)



## Poem for Friday

### From *The Tempest*, Act 4 Scene 1

**By:** William Shakespeare (1564-1616)

Our revels now are ended. These our actors,  
As I foretold you, were all spirits and  
Are melted into air, into thin air:  
And, like the baseless fabric of this vision,  
The cloud-capp'd towers, the gorgeous palaces,  
The solemn temples, the great globe itself,  
Yea, all which it inherit, shall dissolve  
And, like this insubstantial pageant faded,  
Leave not a rack behind. We are such stuff  
As dreams are made on, and our little life  
Is rounded with a sleep.

Recitation by **Patricia Conolly**. With seven decades experience as a professional actress in three continents, Patricia Conolly has credits from most of the western world's leading theatrical centres. She has worked extensively in her native Australia, in London's West End, at The Royal Shakespeare Company, on Broadway, off Broadway, and widely in the USA and Canada.

Her professional life includes noted productions with some of the greatest names in English speaking theatre, a partial list would include: Sir Peter Hall, Peter Brook, Sir Laurence Olivier, Dame Maggie Smith, Rex Harrison, Dame Judi Dench, Tennessee Williams, Lauren Bacall, Rosemary Harris, Tony Randall, Marthe Keller, Wal Cherry, Alan Seymour, and Michael Blakemore.



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She has played some 16 Shakespearean leading roles, including both Merry Wives, both Viola and Olivia, Regan (with Sir Peter Ustinov as Lear), and The Fool (with Hal Holbrook as Lear), a partial list of other classical work includes: various works of Moliere, Sheridan, Congreve, Farquar, Ibsen, and Shaw, as well as roles such as, Jocasta in Oedipus, The Princess of France in Love's Labour's Lost, and Yelena in Uncle Vanya (directed by Sir Tyrone Guthrie), not to mention three Blanche du Bois and one Stella in A Streetcar Named Desire.

Patricia has also made a significant contribution as a guest speaker, teacher and director, she has taught at The Julliard School of the Arts, Boston University, Florida Atlantic University, The North Carolina School of the Arts, University of Southern California, University of San Diego, and been a guest speaker at NIDA, and the Delaware MFA program.

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