

Friday, 25 October 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)

Sandoz AG v Bayer Intellectual Property GmbH (FCAFC) - appeal allowed against a decision upholding two patents regarding a therapeutic drug (I B)

Marinos v Mellissinos & Ors (VSC) - caveat ordered to be removed as the caveator could not show a prima facie case that a court would uphold her claimed equitable interest, and the balance of convenience also favoured removal (I B C)

Lehr v Matters (VSC) - caveat against probate upheld as the caveator had established there was a case for investigation into whether, at the time he executed the propounded will, the deceased lacked testamentary capacity (B)

Harradine v State of South Australia (SASC) - leave refused to appeal against a primary judge's interlocutory decisions not to restrain an opposing counsel from acting, not to grant judgment for default of discovery obligations, and not to disqualify herself for apprehended bias (I B)

Property Developments (WA) Pty Ltd v Lord Forrest Nominees Pty Ltd (WASC) - a contractual date for compliance with a condition did not state a time, and, on the contract's proper construction, the time expired at midnight (I B)

HABEAS CANEM

Habeus Halloween



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Summaries With Link (Five Minute Read)

Sandoz AG v Bayer Intellectual Property GmbH [2024] FCAFC 135

Full Court of the Federal Court of Australia

Yates, Burley, & Downes JJ

Patents - Bayer was the patentee of two patents, being a method for the production of a solid, orally applicable pharmaceutical composition, and for the prevention and treatment of thromboembolic disorders - Bayer sold Pharmaceutical Benefits Scheme listed products comprising the drug that was the subject of the patents - Sandoz sought to revoke the patents on the grounds that the claimed inventions were obvious in the light of the common general knowledge together with an international patent, and certain abstracts published in the scientific literature - the primary judge upheld the patents - Sandoz appealed - held: the primary judge erred in finding that a person skilled in the relevant art could not be reasonably expected to have ascertained the international patent within the meaning of s7(3) of the *Patents Act 1990* (Cth) - "ascertained" in s7(3) simply means "discovered" or "found out" - s7(3) does not require proof that the hypothetical skilled person would ascertain the document, but only requires proof sufficient to demonstrate a reasonable expectation that the skilled person would do so - it is not necessary for evidence to be adduced that the skilled person would prefer, prioritise, or select the information in question over all other information which they could be reasonably expected to have - Sandoz had established on the balance of probabilities that the international patent could be reasonably expected to have been ascertained by the hypothetical skilled person - further, the inventions claimed in both patents were obvious in the light of the general common knowledge and the international patent - in the field of drug development, the need to carry out clinical trials and other tests in order to obtain relevant data can be regarded as routine work consistent with a finding of obviousness - it was implicit in the primary judge's finding that the person skilled in the art would directly be led, as a matter of course, to undertake drug development work regarding the drug in question in the expectation that it might well produce a useful alternative to, or a better drug than, existing compounds - appeal allowed.

[Sandoz AG](#) (I B)

Marinos v Mellissinos & Ors [2024] VSC 642

Supreme Court of Victoria

O'Meara J

Caveats - the plaintiff and defendants were members of a family group that had been resident at a certain property until recently - the plaintiff was the registered proprietor of the property, having purchased it from his parents - the plaintiff's mother lodged a caveat over the property, claiming an equitable interest by way of common intention constructive trust, and that, when the plaintiff purchased the property there was an agreement that the property would belong to the mother and the plaintiff's brother - the property was currently vacant - the plaintiff sought removal of the caveat - held: applications for removal of a caveat are treated in a similar way to applications for interlocutory relief, with the court applying a two-stage test under which the caveator must satisfy the court that there is a probability, on the evidence, that he or she will be

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found to have the asserted equitable rights or interest, and then consideration of the balance of convenience - a common intention constructive trust is 'construed' or 'constructed' by a court to give effect to the common intent of the parties, and the elements required to establish it are very similar to that required for establishing proprietary estoppel - even if any of mother's evidence could be described as 'uncontested', that did not mean that the Court was compelled to accept it - the mother had no demonstrated a prima face case that that it was probable that a court would find there was an agreement and that she had the claimed equitable rights or interests - furthermore, the balance of convenience was also in favour of removing the caveat - neither the mother or the plaintiff's brother was still residing in the property - the maintenance of the caveat would continue to erode any equity in the property, to the benefit of neither the plaintiff nor her mother - order that caveat be removed.

[Marinos \(I B C\)](#)

Lehr v Matters [2024] VSC 640

Supreme Court of Victoria

Daly AsJ

Succession - a deceased died in 2022 after suffering a number of physical and psychological impairments, largely as a consequence of a traffic accident in 2015 - a caveator filed a caveat in respect of the estate - the executors of a 2021 will commenced proceedings seeking removal of the caveat and a grant of probate of the 2021 will - the caveator filed grounds of objection which objected to the grant of probate of the 2021 will, claimed that he had standing to challenge the 2021 will, and asserted that the deceased had lacked testamentary capacity shortly before and at the time of the execution of the 2021 will - held: the task for the caveator in seeking to maintain the caveat was to show that there was a 'case for investigation', or 'something to go on', but mere speculation will not suffice - a testator who leaves a will that is rational on its face and which has been duly executed enjoys the presumption of validity in relation to the will - ill-health, even extreme ill-health, is not enough to establish a lack of testamentary capacity - the caveator in this case had established that there is a case for investigation into whether, at the time he executed the 2021 will, the deceased lacked testamentary capacity - the deceased had been using ketamine and medical marijuana, and the issue here was not whether these drugs impaired the deceased's cognitive functioning, but concerned the impact of delay on the deceased receiving ketamine on his mood and psychological presentation - the Court noted that one does not need to be a medical practitioner to appreciate that the use of medications with psychotropic qualities may impact a person's judgment and decision making, especially if combined with the symptoms of psychiatric ill-health and other vulnerabilities - application to strike out caveat dismissed.

[Lehr \(B\)](#)

Harradine v State of South Australia [2024] SASCA 123

Court of Appeal of South Australia

Livesey P & Bleby JA

Civil procedure - the applicant was arrested and, for a few hours, denied bail in respect of

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charges concerning allegations of sexual assault that the his former wife made against him - he commenced proceedings against a police officer and the State of South Australia asserts causes of action in wrongful arrest, false imprisonment, and malicious prosecution, but later discontinued against the police officer - the primary judge dismissed three motions brought by the applicant (1) to restrain the State's counsel from continuing to act in the proceedings; for judgment in default of compliance with discovery obligations; and (3) that the primary judge disqualify herself for apprehended bias - the applicant sought leave to appeal against these three interlocutory decisions - held the Court has a general unwillingness to grant leave to appeal from interlocutory orders which do not either directly or by their practical effect finally determine the substantive rights of a party - this matter already had a delayed history - none of the orders appealed against determined a substantive right of the applicant - the applicant's submissions did not identify irreparable prejudice - the prospects of success on an appeal against the primary judge's refusal to disqualify herself were negligible - the power to so restrain a practitioner will only be exercised in rare cases, the grounds of appeal relating to the primary judge's refusal to restrain the State's counsel from acting had no chance of success - the defaults by the State regarding discovery did not establish non-compliance such as could be said to seriously prejudice the proper and expeditious conduct of the proceedings - leave to appeal refused.

[Harradine](#) (I B)

Property Developments (WA) Pty Ltd v Lord Forrest Nominees Pty Ltd [2024] WASC 388 Supreme Court of Western Australia

Archer J

Contracts - the first defendant operated a business trading as the 'Hotel Lord Forrest' - the first defendant agreed to sell the business to the plaintiff - settlement was subject to the plaintiff obtaining approval for the transfer of the business' liquor licence by a certain date, and the first defendant was obliged to cooperate with the plaintiff to obtain this approval - the parties agreed to extend the date for approval to another date, without mentioning any time on that date - at 5:18pm on that date, the plaintiff had not obtained approval, and the first defendant sent a termination notice - the plaintiff contended that the notice was invalid because the date by which approval was to be obtained did not finish until midnight - the defendants contended the time for the plaintiff to obtain approval finished at 5pm, and, further, under a clause in the contract, notices emailed after 5pm were deemed to be received on the next business day, so the notice was therefore valid in any event, and they had also sent a second termination notice ten days later - the defendants sought summary judgment - held: the defendants had to establish a high degree of certainty that they would succeed at trial - although it is a matter of construction in each case, ordinarily, where a date and not a time is specified for the fulfilment of an obligation, the time will expire at midnight there was nothing in the text, context or purpose of the contract to indicate that the time would expire at 5pm, and a reasonable businessperson would not have understood the time would expire at 5pm - the Court was not satisfied to a high degree of certainty that the clause deeming emails sent after 5pm to be received on the next business day applied to the email attaching the first termination notice - the first termination notice was invalid



due to it being sent before midnight - the duty on the first defendant to cooperate did not cease to operate after the date for obtaining approval - therefore, the second termination notice was also invalid - application for summary judgment dismissed.

[Property Developments \(WA\) Pty Ltd](#) (I B)

Poem for Friday

Life

By Charlotte Brontë (1816-1855)

LIFE, believe, is not a dream
So dark as sages say;
Oft a little morning rain
Foretells a pleasant day.
Sometimes there are clouds of gloom,
But these are transient all;
If the shower will make the roses bloom,
O why lament its fall ?

Rapidly, merrily,
Life's sunny hours flit by,
Gratefully, cheerily,
Enjoy them as they fly !

What though Death at times steps in
And calls our Best away ?
What though sorrow seems to win,
O'er hope, a heavy sway ?
Yet hope again elastic springs,
Unconquered, though she fell;
Still buoyant are her golden wings,
Still strong to bear us well.
Manfully, fearlessly,
The day of trial bear,
For gloriously, victoriously,
Can courage quell despair !

Charlotte Brontë was born on 21 April 1816, in West Yorkshire, UK. She was an English poet and novelist. She was the eldest of the three Brontë sisters. Her siblings were Emily Brontë, Anne Brontë, Branwell Brontë, Elizabeth Brontë, and Maria Brontë. She had a year of formal education at Clergy Daughters' School at Cowan Bridge. Thereafter she and her siblings learned at home, from each other and their parents, and aunt Elizabeth Branwell who lived with the family. She is famous for her novel *Jane Eyre*, which she first published under the pseudonym Currer Bell in 1847. She was married to Arthur Bell Nicholls from 1854 to 1855, for the last 9 months of her life. Nicholls had been the curate

to Charlotte's father, Patrick Brontë, an Anglican clergyman. Charlotte Brontë died on 31 March 1855 in Haworth, England.

Reading 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.

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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