AR CONOLLY & COMPANY
LAWYERS

Benchmark

Friday, 28 June 2024

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)

In the matter of Openpay Group Ltd (recs and mgrs apptd) (subject to a DOCA) (NSWSC) - leave granted to administrators to transfer all shares to the proponent of a DOCA, as the evidence showed the shares had nil value, and there was thus no prejudice to shareholders (I B)

Botha v Secretary, NSW Department of Customer Service (NSWSC) - Appeal Panel of the NSW Personal Injury Commission had properly engaged with the ground of appeal raised by the plaintiff (I B)

Keybridge Capital Limited v Molopo Energy Limited (NSWSC) - proceedings permanently stayed as an abuse of process, where the claims made could have been made in earlier proceedings between the same parties (I B)

FNH United Pty Ltd v United Petroleum Franchise Pty Ltd (VSC) - leave granted to add new plaintiff representing a distinct sub-group of petrol station franchisees to a class action (I B)

Re Lidgett (No 2) (VSC) - trustee of property trust who had failed to obtain the judicial advice she sought had nonetheless acted reasonably in applying for judicial advice - both parties' costs to be paid on an indemnity basis out of trust assets (B I)

Alananzeh v Zgool Form Pty Ltd (ACTSC) - injured construction worker succeeded in

negligence action against employer subcontractor and the head contractor (I B C)

HABEAS CANEM

First beach holiday

Summaries With Link (Five Minute Read)

In the matter of Openpay Group Ltd (recs and mgrs apptd) (subject to a DOCA) [2024] NSWSC 789
Supreme Court of New South Wales
Black J
Corporations law - Openpay was listed on the ASX and was the parent company of several companies which primarily operated a "buy now pay later" service - the group aimed to extend its business to operate a platform which allowed consumers to complete transactions up to a limit of $20,000 with repayment terms of up to 24 months over a range of industries including automotive, healthcare, home improvement, education and retail - in due course, it entered into a trading halt and receivers and manages, and then voluntary administrators, were appointed - the voluntary administrators sought leave under s444GA of the *Corporations Act 2001* (Cth) to transfer all the shares in Openpay to the proponent of a Deed of Company Arrangement Openpay had entered into“ held: the possibility of prejudice to a shareholder would arise if there was some residual equity in the company - it was difficult to see how shareholders could be prejudiced by the transfer of their shares in the absence of any residual value or equity in the company - the case law established that there would not ordinarily be any prejudice, or no prejudice that has the requisite quality of "unfairness", if the shares had no value and there would be no distribution in the event of a liquidation, which was the only realistic alternative to the proposed transfer - the Administrators bore the legal onus of proving that the Court's discretion to allow the share transfer should be exercised in their favour - an independent expert had valued the shares on an orderly realisation of assets basis, and the Court accepted that other methodologies such as a cash flow basis, a multiple of earnings method, or a quoted price for listed securities basis, were not available or were not appropriate - the Court accepted that the shares had nil value - the recoveries identified by the Administrators in a liquidation scenario would be insufficient to repay creditors in full - there was no prejudice to shareholders in the orders sought by the Administrators being made, let alone unfair prejudice - orders made as sought.
View Decision (I B)

Botha v Secretary, NSW Department of Customer Service [2024] NSWSC 781
Supreme Court of New South Wales
Stern JA
Workers compensation - the plaintiff sustained psychiatric injury by reason of interpersonal conflicts with her direct supervisor in her role as a Senior Executive (Director of Client Stakeholder Services) employed by the Department of Customer Service - she sought compensation and a dispute arose as to the extent of her impairment - a Medical Assessor certified that she had a 9% permanent impairment - as this was less than 15%, s65A and s151H of the *Workers Compensation Act 1987* (NSW) provided that no compensation for non-economic loss under Div 4 of Pt 3 of that Act or claim for work injury damages was available - an Appeal Panel of the NSW Personal Injury Commission affirmed the Medical Assessor's

certificate - the plaintiff sought judicial review of the Appeal Panel's decision - held: subject to materiality, failure by an Appeal Panel to perform its statutory task of conducting a review on the ground, or grounds, of appeal advanced, or a misunderstanding of the case brought by an applicant, may amount to jurisdictional error - it was apparent from the Appeal Panel's decision that the Appeal Panel was aware of, considered, and rejected the plaintiff's sole ground of appeal - in two places, the Appeal Panel correctly identified the plaintiff's contention as to demonstrable error, including that the Medical Assessor's conclusion was illogical and unsupported having regard to the findings in the body of the Certificate - the Appeal Panel engaged with the issue raised by the plaintiff's ground of appeal, which was whether the matters found by the Medical Assessor supported his conclusion as to categorisation on the Social and Recreational Psychiatric Impairment Rating Scale - while the Appeal Panel did not expressly engage with the plaintiff's contention that the Medical Assessor's conclusion should be construed as relying only upon social activities which involved the plaintiff leaving her home, it was implicit in the Appeal Panel's reasoning that they rejected that contention - it was also clear that the Appeal Panel was satisfied that the findings of the Medical Assessor in the body of the Certificate properly supported the Medical Assessor's conclusion that the plaintiff's attendance at social and recreational activities was "regular" - application for judicial review dismissed.
View Decision (I B)

Keybridge Capital Limited v Molopo Energy Limited [2024] NSWSC 779
Supreme Court of New South Wales
Nixon J
Res judicata, issue estoppel, and abuse of process - there had been previous litigation between Keybridge and Molopo concerning two transactions, which lead to a settlement and Keybridge's claims being dismissed by consent - Keybridge later commenced new proceedings regarding the same two transactions seeking declarations that Molopo contravened s674 and s1041H of the *Corporations Act 2001* (Cth), s12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth), and s18 of the *Australian Consumer Law*, and seeking compensation - Molopo sought that the proceeding be permanently stayed on the basis of *res judicata*, issue estoppel, *Anshun* estoppel, or as an abuse of process - held: *res judicata* in the strict sense refers to the principle that, where a final judgment is given, the rights and obligations which were in controversy as between the parties to the proceeding "merge" in the judgment and "cease to have an independent existence" - cause of action estoppel prevents the assertion in a subsequent proceeding of a claim to a right or obligation which was determined in an earlier proceeding - issue estoppel prevents the raising in a subsequent proceeding of an ultimate issue of fact or law which was necessarily resolved as a step in reaching the determination made in the judgment - were the plea is of *res judicata*, only the actual record is relevant, but where the plea is of issue estoppel, any material may be looked at which will show what issues were raised and decided - *res judicata* applies where a judgment is entered by consent - *res judicata* does not require "absolute identity", but rather "substantial correspondence" between the sources and incident of rights asserted in each set of proceedings - the Court was not satisfied that the rights and obligations asserted in the current

proceeding were the same, or substantially the same, as those advanced in the earlier proceedings - neither did the orders made in the first proceedings give rise to any issue estoppel - however, the claims raised in the current proceeding could all have been made in the earlier proceedings - there was no explanation why they had not been - the continuation of the proceeding would be unfairly oppressive and prejudicial to Molopo, would bring the administration of justice into disrepute, and would be inconsistent with the dictates of s56-s58 of the *Civil Procedure Act 2005* (NSW), - the proceeding was an abuse of process - proceeding permanently stayed.
View Decision (I B)

FNH United Pty Ltd v United Petroleum Franchise Pty Ltd [2024] VSC 366
Supreme Court of Victoria
Nichols J
Class actions - group proceedings were brought on behalf of franchisees who operated service station business, selling fuel and retail goods in the United Petroleum franchise network, under standard from Franchise Agreements with the first defendant, UPF - the plaintiffs alleged that the circumstances in which UPF incorporated the 'Pie Face' business into the network, requiring franchisees to stock and sell baked goods under the Pie Face brand, had involved contraventions of industry codes, misleading or deceptive conduct, and unconscionable conduct - the plaintiffs applied to add a new plaintiff to be a representative of a new sub-group of group members, namely 'Commission Agents' who also operated service station businesses in the United Petroleum network but pursuant to standard form 'Commission Agency' agreements with UP - the defendants opposed this - held: the Court accepted many of a defendant's criticisms of the pleading, which appeared to stem in large measure from the generality with which the allegations were articulated and the absence of particulars referring even to the plaintiffs' personal cases - the pleadings would need to be redrafted - r9.06(b)(ii) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) provides that the Court may order joined as a party a person between whom and any party there may exist a question arising out of, or relating to, or connected with, any claim in the proceeding which it is just and convenient to determine as between that person and that party as well as between the parties to the proceeding - 'question', for the purposes of the rule, is defined broadly and includes a question of fact, and is not to be conflated with a cause of action - the allegations against UPF and UP were in materially the same terms - Despite the requirement that the claim be repleaded, it was clear that some questions satisfied the requirements of r9.06(b)(ii), leaving to one side the 'just and convenient' requirement - it was open to conclude that it was just and convenient that the 'questions' that met the requirements of r9.06(b)(ii) be determined in a proceeding to which the proposed new plaintiff was joined, subject to relevant discretionary considerations - on balance, the plaintiffs had established that there was a basis to permit the joinder of the proposed new plaintiff, and the discretionary considerations were not sufficient to persuade the Court to the contrary.
FNH United Pty Ltd (I B)

Re Lidgett (No 2) [2024] VSC 364

Supreme Court of Victoria
Moore J
Costs in advice to trustee cases - a trustee had sought for judicial advice under r54.02 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) that it would be appropriate and justified for her to defend claims brought against her as trustee by the first defendant, and that it would be appropriate and justified for the Trust to pay the defence costs - the Court had given advice that it would be justified and appropriate for the trustee to play no active role in the proceedings and that it would not be appropriate or justified for the Trust to pay her defence costs - the Court now considered costs of the judicial advice application - held: in general, a trustee is justified in seeking advice from the Court, and will be indemnified out of the trust for the costs incurred in doing so - this is confined to costs properly incurred, and does not apply to costs incurred when acting beyond power, in bad faith, or without the care and diligence of a person of ordinary prudence - the onus rests on the party seeking to deny the right to indemnity to show that the costs were improperly incurred - a proceeding by a trustee seeking judicial advice is not ordinary adversarial litigation - the first defendant had not shown the trustee's costs had been improperly incurred - the Court was not satisfied the trustee had failed to exercise the care and diligence of a person with ordinary prudence in incurring the costs of the application for judicial advice - it is very often appropriate for a trustee to approach the Court for judicial advice in cases of doubt, rather than proceeding to expend trust funds in a way which may later be shown to be inappropriate - the Court had reached its conclusions as to the advice to be given only after a detailed consideration of the numerous, substantial, and complex claims made by the first defendant in the other proceeding - both the trustee's and the first defendant's costs to be paid out of the assets of the Trust on an indemnity basis.
Re Lidgett (No 2) (B I)

Alananzeh v Zgool Form Pty Ltd [2024] ACTSC 16
Supreme Court of the Australian Capital Territory
McWilliam J
Negligence - the plaintiff was employed as a labourer by a subcontractor at a construction site when he slipped and fell, injuring his back - he brought proceedings in negligence against the subcontractor employer and the head contractor - the subcontractor had failed to hold the required workers compensation insurance and so the Workers Compensation Default Insurance Fund Manager under Div 8.2.2 of the *Workers Compensation Act 1951* (ACT) was the third defendant - held: the Court accepted the plaintiff's evidence of what had occurred - the subcontractor, as employer, owed a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury - the employer must take into account the possibility of thoughtlessness, or inadvertence, or carelessness, particularly in a case of repetitive work - the head contractor also had a duty to exercise reasonable care with regard to the safety of the area in which it was directing work to be undertaken, but this duty was not non-delegable, and did not extend to telling the plaintiff how to carry building materials, or how to lay them, or to providing mechanical assistance to undertake the work, as those were matters that it was reasonable for the head contractor to expect the subcontractor employer to

manage and supervise - both the head contractor and subcontractor employer had failed to discharge their duties of care - as to causation, the plaintiff did not have to prove that the negligence was the sole causal mechanism, only that it was a necessary condition, pursuant to s45(1)(b) of the *Civil Law (Wrongs) Act 2002* (ACT) - the plaintiff had established that causation here - the evidence did not establish contributory negligence - the plaintiff had had an underlying susceptibility or degenerative condition but that it was asymptomatic, and the fall caused the condition to become symptomatic (whether by exacerbation or acceleration of a degenerative condition), with the result that the current pain symptoms and restriction of mobility were, on the balance of probabilities, causally related to the accident - total damages of about $245,000 assessed - as the plaintiff had established liability against each of the defendants, the plaintiff was entitled to enforce the totality of the judgment against the head contractor, and so, under s170 of the *Workers Compensation Act*, the plaintiff could not claim as against the default insurer - if the subcontractor employer had had funds to meet the claim, the Court would have found the defendants were equally negligent, resulting in apportionment of 50% each.
Alananzeh (I B C)

Poem for Friday

Adlestrop

By Edward Thomas (1878-1917)

Yes. I remember Adlestrop
The name, because one afternoon
Of heat the express-train drew up there
Unwontedly. It was late June.

The steam hissed. Someone cleared his throat.
No one left and no one came
On the bare platform. What I saw
Was Adlestrop only the name

And willows, willow-herb, and grass,
And meadowsweet, and haycocks dry,
No whit less still and lonely fair
Than the high cloudlets in the sky.

And for that minute a blackbird sang
Close by, and round him, mistier,
Farther and farther, all the birds
Of Oxfordshire and Gloucestershire.

Edward Thomas, an English poet biographer, author, essayist, and critic was born on 3 March 1878, the son of Welsh parents, a railway clerk, politician and preacher Phillip Thomas, and Mary Townsend. His connection to Wales was important throughout his life. He was described by Aldous Huxley as "*one of England's most important poets*". Thomas wrote poetry from 1914, when he was 36, encouraged by his new neighbour, the then relatively unknown Robert Frost. During his life, his only published poetry was *Six Poems* (1916) under the pseudonym Edward Eastaway. Thomas struggled with the burden of constant production of what some critics described as "hack work" to support his family, and the work he wished to produce. At times he was reviewing up to 15 books each week. He made many attempts at suicide, suffering marital disharmony and depression. Adelstrop is considered one of Thomas' finest poems. The poem describes the ordinary circumstances of Thomas' train from Paddington to Malvern, stopping at Adlestrop station at 12:15pm with images of the surrounding English countryside. However the poem elicits profound feelings in the reader through those descriptions. Thomas was killed in the Battle of Arras, in France on 9 April 1917, having enlisted for service in the British infantry in 1915. Ted Hughes described Thomas as "*the father of us*

all".

Adestrop by Edward Thomas, composed by Susanna Self- the third of six "Songs of Immortality"
https://www.youtube.com/watch?v=2NYUdo12yfg

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.

Click Here to access our Benchmark Search Engine