

Friday, 28 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)

**Alzheimer's Association of Queensland Inc v Nabelsy** (FCA) - Association failed to obtain orders for examination of electronic devices of an employee said to have retained work in which the Association held copyright (I B)

**Akrawe v Culjak** (NSWCA) - vendors had validly terminated a contract for sale of land and were entitled to the deposit (I B C)

**The Owners - Strata Plan No. 91016 v Upright Builders Pty Ltd (No 2)** (NSWSC) - the *Encroachment of Buildings Act 1922* (NSW) empowers the Court to order a local council to transfer land on which an encroachment is constructed (I B C)

**Yuen & Anor v Louey** (VSC) - judicial advice given that executors would be justified in defending proceedings brought by the deceased's widow claiming equitable ownership of some estate property, and that it was appropriate that the executors be indemnified out of the estate for doing so (I B)

**Anti-Discrimination Commissioner v White** (TASSC) - Tasmanian Civil and Administrative Tribunal had made several errors of law in upholding gender and age discrimination complaint by a police officer (I)

## HABEAS CANEM

In-office conference



# Benchmark

## Summaries With Link (Five Minute Read)

### **Alzheimer's Association of Queensland Inc v Nabelsy [2023] FCA 851**

Federal Court of Australia

Burley J

Copyright - Alzheimer's Association of Queensland is a dementia association and a not-for-profit organisation providing care services, education and training - it employed Nabelsy - the Association commenced proceedings against Nabelsy seeking a declaration that they owned copyright in all documents developed or prepared by the respondent for or on behalf of the applicants using the online platform "Jotform", and a declaration that Nabelsy had used, copied, or removed the Association's confidential information comprising a username and password associated with a Jotform subscription that the respondent had purchased using a work email address - the Association sought interlocutory orders under r14.01(1) of the *Federal Court Rules 2011* (Cth) or s193 of the *Evidence Act 1995* (Cth) for the inspection of certain electronic devices and electronic storage accounts - held: an application for an order under r14.01(1) must be assessed against the balancing factors designed to protect the interests of the respondent, the extent of inspection to be allowed, the strength of the applicant's case, and the utility and contribution the order might make, in a balanced way to the resolution of the issues in the matter - the orders sought were highly intrusive - no evidence was given as to the mechanics of how the inspection would take place, and, as sought, inspection would involve the wholesale copying of all of the respondent's personal and other data on his laptop and external drives - it was not appropriate, on the basis of the current evidence before the Court, to grant the inspection orders sought - the Association had not demonstrated a sufficiently strong case that Nabelsy had in his possession, or may have in his possession or control, documents, either relating to his work using the Jotform platform or otherwise, to warrant the making of such intrusive orders - nor had the Association demonstrated beyond a highly speculative case that the respondent had dishonestly downloaded confidential information upon becoming aware of his termination - undertakings offered by Nabelsy were tantamount to the final relief that the Association sought - application dismissed.

[Alzheimer's Association of Queensland Inc](#) (I B)

### **Akrawe v Culjak [2023] NSWCA 171**

Court of Appeal of New South Wales

Bell CJ, Leeming JA, & Mitchelmore JJA

Equity - Akrawe as purchaser and the Culjaks as vendors entered into a contract for the sale of land in Wetherill Park - Akrawe wanted to substitute his son as purchaser - the Culjaks did not agree to this request - the Culjaks served a notice to complete and then a notice of termination - the parties each commenced proceedings - the Culjaks sought a declaration that the contract was duly terminated and an order that they be paid the deposit - Akrawe sought a declaration that the termination of the contract was invalid (on the basis the Culjaks were not ready, willing, and able to perform) and an order for specific performance - the primary judge declared the contract was validly terminated and ordered the deposit be paid to the Culjaks - Akrawe

# Benchmark

appealed - held: the primary judge did not err in failing to find that the Culjaks had made a final decision not to enter into a contract with Akrawe's son under any circumstances - it was not possible for the Culjaks unilaterally to bind themselves so as to prevent themselves considering a new contract offered to them in the future by Akrawe or his son - what might occur if the son had made an offer to acquire the property for an additional \$100,000, conditional upon the existing contract being rescinded, was unexplored - Akrawe contended for a finding that the Culjaks would not contemplate any alternative offer by the father or son at the same price if it meant giving up their existing entitlements under the extant contract for sale, such that the efforts taken to negotiate the deed and to obtain a bank cheque for the second deposit were entirely wasted - the questions then were: whether that was the Culjaks' state of mind and, if so, whether not communicating that stance affected the Culjaks' entitlement to rely on the notice to complete - the finding by the primary judge was appropriately nuanced and reflected the reality of the position - the primary judge found the Culjaks were keeping open the possibility that they might agree to a course other than their present insistence upon completion of the contract in accordance with the notice to complete - this was inherently plausible - the finding Akrawe sought was implausible - s55(2A) of the *Conveyancing Act 1919* (NSW) gives the Court power to relieve against forfeiture of a deposit which is broader than that available in equity - however, in the exercise of discretion under s55(2A), the court should not weaken the proper function of a deposit as an earnest of performance - as Akrawe had failed regarding his factual grounds of appeal, he could not demonstrate *House v The King* error in the primary judge's failure to exercise the discretion to relieve him against forfeiture of the deposit - in any event, it had not been shown that the primary judge "set the bar too high" or that the discretion otherwise miscarried - appeal dismissed.

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

## **The Owners - Strata Plan No. 91016 v Upright Builders Pty Ltd (No 2) [2023] NSWSC 867**

Supreme Court of New South Wales

Ball J

Encroachment - the Owners Corporation for a high rise residential building in Meadowbank sued the builder and developer for breaches of statutory warranties and negligence - part of the claim concerned a walkway and stairs said to be defective, which were also partly constructed on land dedicated as a public road - Ryde Council was the roads authority under *the Roads Act 1993* (NSW) - the Owners Corporation also sought orders under the *Encroachment of Buildings Act 1922* (NSW) requiring Council to transfer to it that part of the land on which the footway and stairs had been constructed - the Court ordered determination as a separate question whether it had power to grant the relief sought against Council - held: the principle that later legislation can be used to interpret earlier legislation on the basis that legislation is "always speaking" does not mean that the meaning of a statute can change over time - a statute, and its provisions, have one legal meaning which is to be determined in accordance with the principles of statutory construction - in *Pesic v South Sydney Municipal Council* [1978] 1 NSWLR 135, Holland J had held that the *Encroachment of Buildings Act* did not apply to an encroachment on a public road vested in a council by the then *Local Government Act 1919* (NSW) - the Owners Corporation

# Benchmark

accepted it must persuade the Court not to follow *Pesic* - that required the Court to form a strong conviction that *Pesic* was erroneous and not merely the choice of an approach which was open but no longer preferred, and further that error could be demonstrated with a degree of clarity by the application of correct legal analysis - Holland J had been wrong to conclude that the word "land" should be interpreted as excluding a public road - *Pesic* should not be followed - although *Pesic* had stood for more than 45 years, it did not appear to have been applied or considered during that time in relation to the issue currently before the Court, and the circumstances of this case were unusual and could not have been anticipated at the time *Pesic* was decided - Council's alternative argument that the *Roads Act 1993* impliedly repealed the *Encroachment of Buildings Act* insofar as it applied to public roads should also be rejected - question answered that the Court did have power to grant the relief sought against Council, subject to an inherent limitation not to make orders requiring an entity to do what that entity cannot lawfully do.

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

## **Yuen & Anor v Louey [2023] VSC 423**

Supreme Court of Victoria

Irving AsJ

Judicial advice to trustees - the plaintiffs were two of three executors of a deceased - they applied to the Court for directions pursuant to r54.02 of the *Supreme Court (General Civil Procedure) Rules (Vic)* as to whether they were justified in defending equity proceedings commenced by the deceased's widow claiming equitable ownership of some estate property - the estate was currently subject to three family provision proceedings brought by the widow, an adult daughter of the deceased, and the third executor - these proceedings were on hold pending the resolution of the widow's equity proceedings - held: the Court has a broad discretion and power under r54.02 to direct a trustee in relation to the performance of a trust, both concerning the proper construction of a trust instrument, and the proper administration or execution of an estate or trust - the procedure is a summary one, intended to enable questions arising in the administration of an estate or a trust to be resolved cheaply and simply, and it operates as an exception to the Court's ordinary function of deciding disputes between competing litigants - the summary nature is important in understanding the evidence the Court is entitled to rely upon in giving its advice - the evidence is ordinarily untested, and the extent of the information available and its apparent reliability are factors going to the exercise of the discretion to give the advice - Counsel's opinion is usually important in judicial advice proceedings - in this case, a significant portion of the residuary beneficiaries were infants, and therefore were reliant on the executors to protect their interests - the plaintiffs had obtained advice from counsel, to the effect that there were proper grounds for the executors to defend the equity proceedings, and that to do so would be in the legitimate interests of the estate - the Court read counsel's opinion, and was satisfied that it was soundly based in fact and law - the plaintiffs were not in a position of direct conflict in the equity proceedings - the plaintiffs notified the Court through their counsel that, before entering any agreement to compromise the equity proceedings, they would obtain the consent of all of the adult beneficiaries of the estate - any

such compromise would also likely require the Court's approval or advice under the Rules - advice given that the plaintiffs would be justified in defending the equity proceedings, and that it was appropriate that the plaintiffs be indemnified for their costs of doing so.

[Yuen & Anor \(I B\)](#)

## **Anti-Discrimination Commissioner v White [2023] TASSC 26**

Supreme Court of Tasmania

Marshall AJ

Administrative law - White made a complaint to Equal Opportunity Tasmania regarding age discrimination - White been a police officer with Tasmania Police since March 1982 and intended to retire in April 2025 - he claimed to have been overlooked for a transfer to a vacancy at Richmond Police Station for which he applied in 2020 - he claimed a manager in Tasmania Police told him that a key consideration in the selection of the successful applicant was the "career stage" of the applicant and that preference was given to "an applicant at the early stage of their career" to "mitigate the likelihood of the successful applicant remaining in this specific tenure for a protracted period" - the Anti-Discrimination Commissioner upheld the decision to promote the originally successful candidate - White applied to the Tasmanian Civil and Administrative Tribunal alleging age and gender discrimination - the Tribunal found White was discriminated against on the basis of gender, and awarded \$20,000 by way of compensation - the Commissioner appealed to the Supreme Court - held: the relevant discrimination either occurred at the selection stage or it did not, and it was clear from the reasons of the Tribunal that it did occur at the selection stage - a finding should have been made on that basis and the remedy adjusted to take into account the existence of direct age discrimination at the selection stage - in finding that discrimination was cured at the selection stage by what happened at the grievance stage, the Tribunal had erred in law - the Tribunal had also erred in law in taking a narrow, restrictive, and pedantic approach to s25 and s26 of the *Anti-Discrimination Act 1998* (Tas) - the Tribunal had also erred in law by construing s104(1) of that Act in a way that meant that no vicarious liability would arise for discriminatory conduct in the absence of an order under s89 of the Act - the Tribunal also erred in law by holding that breaches of s104 can only be dealt with by the Supreme Court - matter remitted to the Tribunal, differently constituted, to hear and determine in accordance with law.

[Anti-Discrimination Commissioner \(I\)](#)



## Poem for Friday

### Holy Sonnet X: Death, Be Not proud

By: John Donne (c. 1572-1631)

Death, be not proud, though some have called thee  
Mighty and dreadful, for thou art not so;  
For those whom thou think'st thou dost overthrow  
Die not, poor Death, nor yet canst thou kill me.  
From rest and sleep, which but thy pictures be,  
Much pleasure; then from thee much more must flow,  
And soonest our best men with thee do go,  
Rest of their bones, and soul's delivery.  
Thou art slave to fate, chance, kings, and desperate men,  
And dost with poison, war, and sickness dwell,  
And poppy or charms can make us sleep as well  
And better than thy stroke; why swell'st thou then?  
One short sleep past, we wake eternally  
And death shall be no more; Death, thou shalt die.

**John Donne**, was born in 1571 or 1572. His family was Roman Catholic, a religion illegal in England, and they suffered great persecution. His father died when he was four years old. His mother was the daughter of a play- write, the sister of a Jesuit priest, and the great niece of Thomas More. From the age of 11 Donne studied at Oxford, and after three years, he was admitted to the University of Cambridge. As he refused to take the *Oath of Supremacy* he was not awarded a degree. He later converted to Protestantism in the 1590s given that advancement in society was dependant on adherence to the Church of England. Donne was an English poet, statesman, politician, soldier and priest. In 1601 he was briefly imprisoned, after secretly marrying 16 year old Lady Egerton, without the approval of his future father- in- law. In 1602 Donne was elected as an MP for Brackley. He had wealthy patrons and friends who supported him as a poet. In 1615 on the urging of King James he became an ordained priest of the Church of England. He was from 1621 the Dean of St Paul's Cathedral, London, and well known for his sermons. He was known for his great love poems. He had 12 children, the last still-born, 5 days before the death of his wife. His poetry is described as metaphysical (from the Greek *meta ta physika* meaning "after the things of nature"). For Donne poetry was a means of exploring and expressing ideas experienced outside of ordinary human physical perception. He died on 31 March 1631 in London and is buried in St Paul's Cathedral.

[https://en.wikipedia.org/wiki/John\\_Donne](https://en.wikipedia.org/wiki/John_Donne)

Sir John Gielgud reads **Holy Sonnet X: Death, Be Not Proud**.

# Benchmark



AR CONOLLY & COMPANY  
L A W Y E R S

<https://www.youtube.com/watch?v=-A8mojwHjzU>

[Click Here to access our Benchmark Search Engine](#)