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Friday, 29 September 2023

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)

Willis Brothers Installations (Qld) Pty Ltd v Ruttley (FCA) - primary judge had erred in assessing pecuniary penalties for breaches of the *Fair Work Act 2009* (Cth) regarding adverse action (B C I)

Hart v MetLife Insurance Limited (NSWCA) - parties had jointly misapprehended that answers to separate questions sufficed to dispose of the whole of proceedings commenced to establish a right to a total and permanent disability benefit (I)

Ritson v State of New South Wales (NSWCA) - leave to appeal against dismissal of workers compensation claim refused, as argument that a previous payment under a settlement deed was not damages in respect of the same injury had no prospect of success (B I)

L9E8 v State of New South Wales (NSWSC) - leave granted *nunc pro tunc* to a prisoner to commence proceedings where he alleged sexual assault by a correctional officer during an earlier period in youth detention (I)

Thompson v Cavalier King Charles Spaniel Rescue (Qld) Inc (QSC) - review of costs assessment remitted to costs assessor after original assessment process was flawed (I)

HABEAS CANEM

Apiculturist

Summaries With Link (Five Minute Read)

Willis Brothers Installations (Qld) Pty Ltd v Ruttley [2023] FCA 1147
Federal Court of Australia
Meagher J
Adverse action in employment - Willis Bros manufactures and installs stone benchtops - Ruttley commenced employment with Willis in 1997 at the age of 18 and was promoted to production and installation manager in 2007 - he was the Queensland Building and Construction Commission license nominee for Willis Bros - by 2013, Ruttley had acquired a 17% interest in Willis Bros, and his brother, who had also worked in the business, had acquired a 30% interest - Duncan Willis owned the remaining 53% - in 2018, Ruttley was diagnosed with lymph node silicosis, and Duncan considered he would not be able to continue in employment - Ruttley's brother who had also been diagnosed with silicosis was terminated in 2019, and refused to transfer his interest in Willis to Duncan - Ruttley made a workers compensation claim that was accepted - Duncan's failed to obtain the Queensland nominee supervisor licence, and became increasingly aggressive and intimidating towards Ruttley - Duncan made an offer to buy out Ruttley's interest in Willis which was not accepted - Duncan recalled Ruttley's two vehicles, diverted his phone, and cancelled his fuel card - Duncan then removed Ruttley as a director and terminated his employment - Ruttley sued under the *Fair Work Act 2009* (Cth) - the primary judge found three contraventions: (1) adverse action of terminating Ruttley's employment because he was a person with a physical disability contravened s351(1); (2) adverse action of injuring Ruttley in his employment because he exercised his workplace right to make a workers compensation claim contravened s340; and (3) adverse action of terminating Ruttley's employment because he had exercised a workplace right to make an inquiry in relation to his employment regarding leave and entitlements contravened s340 - in addition to damages, the primary judge ordered a pecuniary penalty of $44,100 for contraventions (1) and (2) and $31,500 for contravention (3), totalling $75,600 - Willis appealed against the pecuniary penalties - held: the imposition of penalties under s546 of the Act is discretionary, and the Court will only interfere for *House v The King* error - the primary judge considered the termination of employment for each of the two penalties - the primary judge had thereby erred by not having regard to s556, which provides that a person must not be ordered to pay a pecuniary penalty under a civil penalty provision for conduct that had been subject to some other Commonwealth law - in re-exercising the discretion as to penalties, the Court should consider the undisturbed factual findings of the primary judge but reach its own view as to the appropriate penalty - the only purpose for imposing a penalty is deterrence, both specific and general - contraventions (1) and (3) concerned the same conduct and should be grouped as a single course of conduct, but contravention (2) was distinct - treating the contraventions in this way would not cause Willis to be penalised twice for the same conduct - Willis' conduct had been egregious and unjust - pecuniary penalties of $47,250.00 for contraventions (1) and (3) and $34,980 for contravention (2) should be imposed, totalling $82,230.
Willis Brothers Installations (Qld) Pty Ltd (B C I)

Hart v MetLife Insurance Limited [2023] NSWCA 230

Court of Appeal of New South Wales

Meagher, Leeming, & Mitchelmore JJA

Insurance - Hart made a claim for a total and permanent disablement benefit under a group life insurance policy - she commenced proceedings, seeking declaratory relief and an order for payment of the benefit claimed - the definition of total and permanent disablement under the policy had two limbs, both of which had to be satisfied - the second limb required that he insured group member be incapacitated and that MetLife be satisfied that the insured member was incapacitated to the extent that she was unlikely ever to work again - the insurer, Metlife, applied to have certain questions determined separately, which were in substance whether MetLife's decision to deny Hart's claim, and its later decision not to reconsider its earlier denial, involved breaches of its duties to act in good faith and fairly - when the primary judge answered the first two questions in the negative, the parties agreed to orders dismissing the whole of the proceedings, and the primary judge made such orders - Hart appealed against the primary judge's answers, and, when prompted by the Court, also against the order dismissing the proceedings - held: in a case where there is a challenge to a life insurer's opinion as to incapacity on the basis that it has not been formed in accordance with the principles identified in *Edwards v The Hunter Valley Co-op Dairy Co Ltd* (1992) 7 ANZ Ins Cas 61-113, the resolution of that challenge has been described as involving two stages: stage 1 is directed to whether the insurer's opinion was formed in accordance with those principles and has contractual effect; stage 2 arises if the insurer's opinion was not formed in accordance with those principles, and requires the court to form an opinion as to incapacity - MetLife had not formed any opinion for the purposes of the second limb of the definition of total and permanent disablement because it believed it was not on risk for the psychological illnesses which had caused Hart's incapacity - MetLife's contention that, on the approach taken by the parties, the answers to the separate questions substantially disposed of Hart's claim for relief, should be rejected - as a consequence of the parties adopting the two-stage approach to the resolution of policy coverage issues which, on a correct analysis, could only be decided by the Court, the parties had proceeded under a misapprehension - as none of the separate questions addressed the mainly factual coverage issues, there was no basis on which answers to those questions could substantially dispose of that claim as pleaded - there was also no justification for that conclusion arising from the way in which Hart's claim was pleaded and conducted - the dismissal of the whole of the proceedings without addressing the coverage issues was the result of a shared misapprehension of the parties rather than the intended and consensual outcome of an arrangement between them to treat a reasonable determination of those issues by MetLife as a proxy for the decision of the Court - the parties' agreement in the making of an order dismissing the proceedings did not mean the primary judge had not erred in making that order - the adoption by the legal representatives of the parties of a mistaken and wrong assumption that the issues raised by Hart's claim might be dealt with by a particular procedure could not deny Hart the opportunity to have her pleaded claim dealt with by the Court on its merits - appeal allowed, and proceedings remitted to the Equity Division.

View Decision (I)

Ritson v State of New South Wales [2023] NSWCA 226
Court of Appeal of New South Wales
Meagher JA, Simpson, & Griffiths AJJA
Workers compensation - Ritson was a Senior Constable in the NSW Police Force who was assaulted by an offender and sustained an injury to his right thumb - he applied to the Personal Injury Commission for payment of medical expenses of $825 for a "Co2 Fractional Ablative Laser Treatment for surgical scar to right thumb" pursuant to s60 of the *Workers Compensation Act 1987* (NSW), naming the NSW Police Force as respondent - the Commission found that it had no jurisdiction because Ritson was then a resident of Queensland, and his claim against an entity of the State of NSW involved the exercise of federal jurisdiction, with which the Commission was not invested - Ritson then sought leave to apply to the District Court under s26(3) of the *Personal Injury Commission Act 2020* (NSW) - the primary judge dismissed this application, on the basis that Ritson had already received a payment under a deed of settlement that constituted damages, and s151A of the *Workers Compensation Act 1987* (NSW) precluded further discovery - Ritson then filed an application for leave to appeal, and then an appeal purportedly as of right, in the Court of Appeal - the State sought orders that the (purported) appeal be dismissed as incompetent, on the basis that it did not satisfy the financial threshold ($100,000) prescribed by s127(2)(c) of the *District Court Act 1973* (NSW) - the Court dealt with the matter as a concurrent hearing of Ritson's application for leave to appeal and his notice of appeal, and the State's notice of motion - held: the orders from which Ritson sought to appeal were orders made in a proceeding that involved a claim for medical expenses of $825 - it did not matter that he had later made a further claim for weekly payments of compensation that, if successful, would result in an award of over $100,000, even if that claim would be "stifled" if the current appeal were unsuccessful - the appeal was incompetent and leave was required - generally speaking, it is only appropriate to grant leave in matters that involve issues of principle, questions of public importance, or in circumstances where it is reasonably clear that an injustice has incurred by reason of error in the judgment, going beyond what is merely arguable - the settlement deed had identified the payment to Ritson as "damages" - none of Ritson's arguments that that payment was compensation under the *Workers Compensation Act* and not damages had any prospect of success on appeal - Ritson's argument that the payment was not "in respect of" the injury in respect of which he sought the $825 payment was not easy to follow, and had no prospect of success - failure on the part of a decision-maker to address a "substantial, clearly articulated argument relying on established facts" constitutes a denial of procedural fairness - however, the primary judge had not denied procedural fairness by allegedly failing to address an argument that the conduct of the Police Force created an estoppel by convention - leave to appeal refused, and appeal dismissed as incompetent.
View Decision (B I)

L9E8 v State of New South Wales [2023] NSWSC 1169
Supreme Court of New South Wales
Walton J

Sexual assault - the plaintiff was 21 years old - when the plaintiff had been 17 years old, he had been in detention in relation to a police charge - he later commenced proceedings against the State, alleging that he had been repeatedly sexually assaulted by a correctional officer during that detention - at the time he commenced proceedings, and currently, he was incarcerated at the Macquarie Correctional Centre; having been convicted of a serious indictable offence, namely, the supply of a stolen firearm contrary to s51H of the *Crimes Act 1900* (NSW) - s4 of the *Felons (Civil Proceedings) Act 1981* (NSW) provides that a person who is in custody as a result of having been convicted or found to have committed a serious indictable offence may not institute any civil proceedings in any Court except by the leave of that Court - the plaintiff sought leave *nunc pro tunc* under s4 to commence the proceedings the applicant also sought a suppression order over his identity - the State neither opposed nor consented to this application - held: s5 of the *Felons (Civil Proceedings) Act* provides that a Court shall not grant leave under s4 unless satisfied that the proceedings are not an abuse of process and that there is prima facie ground for the proceedings - an expert report from a psychologist that was annexed to an affidavit of the plaintiff's solicitor set out extensive psychological difficulties that the expert considered had been caused by the alleged sexual assaults, and that the more recent criminal behaviour of the applicant was directly or indirectly due to the sexual abuse - this amply satisfied the requirements that the proceedings were not an abuse of process and that there was a prima facie ground for them - leave should be granted nunc pro tunc - the evidence of the solicitor was that she had represented other parties where articles have been published in The Telegraph reporting that they had commenced proceedings and were bringing a claim for sexual, physical, and psychological abuse - the plaintiff feared for his safety and that of his family if other offenders became aware that he was a victim of sexual abuse - he feared that his family may be stood over for the payment of moneys if it became known he may be entitled to receive compensation moneys - it was appropriate to grant a suppression order over the plaintiff's identity.
View Decision (I)

Thompson v Cavalier King Charles Spaniel Rescue (Qld) Inc [2023] QSC 214
Supreme Court of Queensland
Callaghan J
Costs assessment - the Court had earlier ordered that Thompson's appeal be dismissed with costs - the respondent obtained a Costs Assessor's Certificate - Thompson sought that this certificate be set aside pursuant to r742 of the *Uniform Civil Procedure Rules* 1999 (Qld) - the respondent sought that Thompson's application be dismissed for non-compliance with the implied undertaking in r5(3) to proceed in an expeditious way, or alternatively, for want of prosecution - held: the claims that the costs assessor was biased were not made out - although Thompson claimed that the assessor made "derogatory" comments, these were directed at his submissions, not at him personally - the fact that the assessor did disallow 63 items told against any assertion that he was "incapable of alteration" or "not open to persuasion" - the allegations of errors in the exercise of the costs assessor's discretion y did not raise issues that were appropriate for review in the Court of Appeal - "he cases as to when a court will review a costs

assessor's exercises of discretion make it clear that a court will very rarely re-examine matters which are in a costs assessor's discretion - Thompson's notice of objections provided to the costs assessor contained a large number of objections, some of which were deficient on their face, and which frequently referred to more than one item - however, notwithstanding that objection was taken in sometimes trivial terms to almost every item in the assessment, the objection was broadly compliant with the requirements under r706(2) of the *Uniform Civil Procedure Rules* - Thompson had requested reasons under r738, in a document that ran for 80 paragraphs over 18 pages, which contained numerous assertions and demands for information in strident terms - understandably but unfortunately the costs assessor provided an argumentative response - having correctly set himself the task of resolving an "item by item" contest, the costs assessor had become distracted - the costs assessor made misdirected comments that the request for reasons was non-compliant, where there was no requirement that a request for reasons comply with any particular format - since so much of the costs assessor's reasons were couched in terms which addressed the request for reasons rather than the objections to the assessment, Thompson had established a valid concern - the only appropriate form of relief was referral of the review of the assessment to another costs assessor - due to the delay in bringing this application, the original costs assessor had retired in any event - the respondent's submission that Thompson should provide security for the costs of the new assessment had merit - Thompson, if he wished to persist with his review of the certificate, must pay into court the new assessor's estimate of costs - the Court also fashioned orders for the conduct of the review of the costs assessment, should it take place.
Thompson (I)

Poem for Friday

Lost Faith

By: Emily Dickinson (1830-1886)

To lose one's faith surpasses
The loss of an estate,
Because estates can be
Replenished, -- faith cannot.

Inherited with life,
Belief but once can be;
Annihilate a single clause,
And Being's beggary.

Emily Dickinson, was born on 10 December 1830. Her father was a lawyer, and a trustee of Amherst College where Emily Dickinson was later educated. Her forebears had travelled to Massachusetts two hundred years earlier as part of the Great Puritan Migration. Although now regarded as one of America's greatest poets, Emily was not well known as a writer while she was alive. She wrote 1800 poems but only 10 were published during her life. Emily lived a reclusive life for over 20 years, and there has been speculation as to whether her seclusion may have been because of a medical issue, such as epilepsy or autism. Emily Dickinson died on 15 May 1886. Although the cause of death is nominated as Bright's Disease on the death certificate, her medical practitioner said that she had not permitted him to examine her or take her pulse for two years before her death. There is a suggestion that she died following a stroke. Although she had extracted from her sister Lavinia, a promise that after Emily's death her poems would be burned, her sister Lavinia published her poems with the assistance of Thomas Wentworth Higginson and Mabel Loomis Todd. The poems were heavily edited to fit conventions of the day, and it was not until 1955 that Emily Dickinson's poetry was published in the original form in which it had been written.

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