

Friday, 31 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)

In the matter of Mearth Technology Pty Ltd (NSWSC) - expressing a statutory demand in US dollars had not been a defect, and had not led to any substantial injustice (I B)

Kohkanzada v Amiri (NSWSC) - malicious prosecution claim against persons who had complained to police failed as the plaintiff could not prove to the relevant standard that the complaints had been fabricated (I B)

Giurina v Sheriff (Vic) (VSCA) - claim by an executor/beneficiary that the estate had been administered and he held real property in his personal capacity was bound to fail where the property was still registered in the name of the deceased (I B)

Hookway v Hookway (TASFC) - in the circumstances of this case, failure to agree in a settlement agreement as to the consequences of non-fulfilment of conditions precedent meant the settlement agreement lacked sufficient certainty to constitute a valid and enforceable contract (I B C)

Ross v Gordon (ACTSC) - an executor was not estopped by previous proceedings from refusing to pay a gift in a will where there was no money in the estate to do so (B I)

HABEAS CANEM

A dog day



Summaries With Link (Five Minute Read)

In the matter of Mearth Technology Pty Ltd [2024] NSWSC 656

Supreme Court of New South Wales

McGrath J

Corporations law - Mearth was an Australian micromobility company based in Sydney that focused on the creation, innovation, and development of electric scooters - it ordered scooters from China and entered into arrangements between its suppliers pursuant to which the debts owing by Mearth to the suppliers were assigned to 40Seas under debt factoring arrangements - in due course, 40Seas served a statutory demand on Mearth - Mearth applied under s459E of the *Corporations Act 2001* (Cth) that the statutory demand be set aside - at hearing, Mearth relied on the sole ground that the demand should be set aside because, due to defects in the demand, substantial justice would be caused unless it were set aside, or there were some other reason why the demand should be set aside, under s459J - the alleged defects were that the demand stated a global amount in US dollars, that this amount was not presently due and payable, and that the demand failed to state a conversion rate into Australian dollars and date - held: a statutory demand for multiple debts must give a description of the individual debts and state their amounts as well as state the total of those amounts - the affidavit accompanying the statutory demand had identified the details of each invoice, so there was no substantial injustice caused by the demand stating only a global sum - there was no basis for the argument that the whole of the amount contained in the statutory demand was not due and payable - the relevant clauses in the agreements operated such that, when a direct debit authority was revoked, each of the amounts became immediately due and payable - expressing the statutory demand as an amount owing in US dollars was not a defect with respect to each of the invoices which contained amounts payable in US dollars - another invoice contained a conversion rate, and so there was no defect regarding this amount - even if the statement in US dollars had been a defect, there had been no substantial injustice caused to Mearth - the evidence was that Mearth knew that each of the invoices was payable in US dollars - application to set aside statutory demand dismissed.

[View Decision](#) (I B)

Kohkanzada v Amiri [2024] NSWSC 492

Supreme Court of New South Wales

Cavanagh J

Malicious prosecution - the plaintiff was an Afghani who married an Australian citizen in Afghanistan, in an arranged marriage - the wife then sponsored the plaintiff's entry to Australia as his spouse - within days of arrival in Australia, the plaintiff was charged with domestic violence offences, and remained in custody for over a year, until he was acquitted of all of the charges - he was released from custody but then detained in an immigration detention centre for nearly a year - the plaintiff claimed the prosecutions arose from fabricated statements made to the police by his wife and her brother, a police officer, with a view to having him deported back to Afghanistan because she no longer wished to go ahead with the marriage - he

commenced proceedings against the wife, her brother, and the State of NSW in malicious prosecution - the claim against the State settled, but the case against the wife and brother went to trial - held: the elements of malicious prosecution are: (1) proceedings of the kind to which the tort applies (generally, criminal proceedings) were initiated or maintained against the plaintiff by the defendant; (2) the proceedings were terminated in the plaintiff's favour; (3) the defendant in initiating or maintaining the prosecution acted with malice; and (4) the proceedings lacked reasonable and probable cause - for the defendants to be considered prosecutors, the Court must be satisfied they played an active role in the conduct of the proceedings, as by instigating or setting them in motion - it is not enough that a defendant has merely provided false information to the police, but rather that false information must be of such a character that it operates on the mind of the prosecuting authority so as to "procure" the bringing of the charges against the plaintiff - where a prosecuting authority has an independent means of assessing the truth of a defendant's claims, the defendant is unlikely to be considered a prosecutor - the wife was a prosecutor for the purposes of these proceedings in respect of certain charges, as she gave a statement to the police and identified her sister-in-law as a witness to the events, and there was no physical evidence or other independent way of verifying her complaint, and it was her statement which led to the prosecution on the basis that the events were solely within her knowledge - the brother, but not the wife, was a prosecutor in respect of certain other charges, as he had provided a contemporaneous statement to the police and brought along a witness to corroborate his version, and there was no physical evidence or other means of verifying his statement - elements (3) and (4) turned on whether the plaintiff had proved to the relevant standard (bearing in mind *Briginshaw v Briginshaw* (1938) 60 CLR 336) that the statements had been fabricated - the plaintiff had not proved this to the Court's satisfaction - proceedings dismissed.

[View Decision](#) (I B)

Giurina v Sheriff (Vic) [2024] VSCA 112

Court of Appeal of Victoria

Walker & Orr JJA

Succession - an executor of his late great-aunt's estate had engaged in a long-running dispute with Geelong City Council in relation to the property (see Benchmark 23 June 2023 and 8 December 2023) - following two proceedings, two costs orders were made against the executor in his capacity as executor of the estate - Council has sought to have the property sold in order to recover the costs due to it pursuant to the costs orders, and two warrants were issued authorising the sale of the property by the Sheriff - the executor sought to prevent that sale by seeking an interlocutory injunction against the Sheriff to prevent it from taking place - the executor also sought leave to lodge two caveats on the property - the primary judge rejected both applications the day before the sale was due to occur - the executor sought leave to appeal, and, in the case of the caveat proceeding, an extension of time in which to seek leave to appeal - held: while it was true that the question whether the estate had been fully administered had not been specifically determined, the question whether the property remained property of the estate and available to meet the costs order had been squarely addressed by

previous decisions - the executor had not made out a prima facie case in the sense that there was a probability that at the trial of the action he would be held to be entitled to relief - the deceased remained the registered owner of the property, and so her estate was thus the legal owner of the property - the effect of s13(1) of the *Administration and Probate Act 1958* (Vic) was that the property vested in the executor as executor upon the grant of probate - although, under the will, the executor was the beneficiary who stood to receive the property, formal transfer of the registered title to the property to the executor had not occurred - even though an executor is not obliged to become the registered proprietor of property in an estate they are administering, the estate cannot be regarded as having been fully administered until the assets of the estate have been distributed in accordance with the will - in so far as money or chattels are concerned, distribution may be informal, but so far as real property is concerned, attention must be paid to the registered title the executor's underlying claim in the injunction proceeding had no prospects of success, and the balance of convenience weighed against the grant of an interlocutory injunction - the primary judge had therefore been correct to refuse to grant an interlocutory injunction to restrain the sale of the property - the executor's application for leave to lodge the two caveats is founded on the same underlying claim as is made in the injunction proceeding - this claim had no prospects of success - particularly bearing in mind the history of the proceedings, the primary judge had been correct to refuse the application for leave to lodge the caveats - leave to appeal and an extension of time in which to seek leave to appeal refused.

[Giurina](#) (I B)

Hookway v Hookway [2024] TASFC 3

Supreme Court of Tasmania

Pearce & Brett JJ, & Martin AJ

Contracts - a deceased died, and his daughter and son then engaged in complex litigation about the estate, which they settled - the daughter then brought an action seeking a declaration that the settlement agreement was void, and the son counterclaimed for specific performance of the agreement - the primary judge upheld the daughter's claim and dismissed the counterclaim, finding that, although the parties had intended the agreement to be binding, it was void because it was incomplete and lacked sufficient certainty to constitute a valid and enforceable contract, and, in particular, did not deal with matters essential for its operation the son appealed - held: a valid contract will only arise if it includes all terms regarded by the parties or the law as essential to achieve legally binding relations - an agreement is incomplete if an essential, fundamental or critical term is left out - when assessing whether an agreement is complete, it is necessary to take into account the entire agreement, including both express and implied terms - the uncertainty identified by the primary judge did not lie in the implied and express terms of the agreement, as the means by which the parties intended to settle their diverse and long running dispute were clear enough - however, the satisfaction of certain conditions precedent were out of the hands of the parties and were entirely contingent on the decisions of others - the primary judge had been correct to construe these conditions as not only precedent to the clause to which they directly related, but as precedent to the performance of the entire agreement - this had to be the case given the interdependent nature of the agreement - the primary judge had

Benchmark

clearly been correct to conclude that the agreement did not expressly address the consequences of the failure of one or more of the conditions precedent, both in terms of the question of termination, and the practical consequences of partial performance of other aspects of the agreement in the event of termination - agreement as to the consequences of non-fulfilment of the conditions precedent had been essential to the achievement of a legally binding agreement - a matter critical to the workability of an agreement may be essential if it is necessary to ensure the achievement of the agreement's underlying purpose, even though it is not legally essential - the intention of the parties to resolve all aspects of their dispute by an interdependent set of diverse actions, subject to multiple, yet practically independent, conditions precedent, and the consequent finding that the failure of any condition precedent would relate to performance of the whole agreement, were critical points of distinction between this case and prior cases in which a court had held that the consequences of non-fulfilment of conditions precedent was not an essential matter requiring agreement before a binding contract came into effect - appeal dismissed.

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

Ross v Gordon [2024] ACTSC 158

Supreme Court of the Australian Capital Territory

Mossop J

Estoppel - before her death, a deceased has established a trust, and wrote three cheques to the trust totalling about \$1.2million, which was more than the likely value of her estate - the cheques were not presented before her death - the deceased's purpose in doing this was to create a liability for her estate to prevent the plaintiff, her former de facto partner with whom she still had some contact, from making a claim against the estate for more than the \$200,000 she was prepared to leave him - the plaintiff commenced a family provision claim, which a single judge of the Supreme Court dismissed on the basis the estate had no net assets because of the cheques - the Court of Appeal found the cheques did not create a liability in the estate because there was no consideration for them, and remitted the proceedings to the primary judge - the plaintiff indicted to the primary judge that the family provision claim was not pressed, and the primary judge held she did not have jurisdiction under the remittal to grant different relief the plaintiff sought and an appeal in this respect was dismissed - the executor then refused to pay the \$200,000 gift in the will to the plaintiff, on the basis that there was no money to do so, as specific gifts took priority over a gift on money out of the general assets of the estate - the plaintiff contended that the executor was prevented from taking that position by either issue estoppel or Anshun estoppel, and applied for the removal of the executor under s32 of the *Administration and Probate Act 1929 (ACT)* on the ground that the executor would not pay that and a similarly situated gift, and that the executor proposed to reimburse legal costs to herself from the estate - held: a judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies - the estoppel covers only those matters which the prior judgment necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be



restrained or that rights be declared - the distinction between *res judicata* and issue-estoppel is that in *res judicata* the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in issue estoppel, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order - none of the previous judgments determined as a matter of fact that there would be funds to allow a payment to the plaintiff as contemplated by the will - it was not the case that, by reason of some determination in the earlier proceedings, the executor became bound to pay \$200,000 to the plaintiff even if, as a matter of fact, there were no funds permitting that to occur and the absence of funds was not the result of any misconduct - the executor was entitled to reimburse herself for legal costs properly incurred as an incident of the administration of the estate - application dismissed.

[Ross](#) (B I)



Poem for Friday

Blink Of An Eye

By Brian Conolly (Published 22 May 2024)

An aurora peak of the ages.
A moment to draw that last breath
A final blink of the eye
A peaceful squeeze of the hand
A love says goodbye

Here we remain
A protected race of beings,
A world of nature and wonder
An impossible probability
Evolving in planet years.
Shrouded in a field
A magnetic shield
We live and grow and we die

Our ancestors and our children
Witness the same Luna cycles
We go and the days continue as before
None of us are here too long

We stand in our golden zone
Building ways to count the sky
How many solar worlds are there
they too will evolve and grow
Through ages of auroras
where distance is measured In light
Even planets can die

Our whole magnificent race
in this time of suns
also here in the blink of an eye

We live nearly a hundred years
And only ten make a millennia
Then only two millennia
For ancient writings.



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It's all really very recent

Water ripples sparkle the sun
Followed by a heron or a gull
Messages above and beyond
Inside the sea and on the land

Artists paint, and write, and photograph
Each seeing their own personal verse
Or lens
or colourway
The perspective from each is equally valid
No matter how different

Theirs is a view to anyone who will listen
Perhaps to learn a new angle
Yet the deep truth the artist feels
Remains mostly with them.

Come here today and stand by together
In your reality,
or others
or mine
It is all equally true
so embrace it

Cast no doubt that this man that passed us
Knew this well
Loving all
no matter the differences
He loved you and I loved him

All in the blink of an eye.

This poem recited by Brian Conolly was presented as a tribute to Alan Conolly in Upper Chapter House, following the funeral in St Andrew's Cathedral on 23 May 2024.

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