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Daily Insurance

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (One Minute Read)

Lehrmann v Network Ten Pty Limited (Costs) (No 2) (FCA) - court revoked order that quantification of costs of a defamation action be referred to an expert, and adopted a broadbrush approach in ordering costs in a fixed sum

Goldspring v Jordan (NSWCA) - primary judge had not erred in finding that executors had committed a civil contempt of court in failing to fully comply with an order for accounts and to produce documents

Rydzewski v Rydzewski (NSWSC) - transfers of properties made by a deceased during her life had been procured by unconscionable conduct and undue influence

In the matter of Resicomm Electrical Pty Ltd (NSWSC) - court granted retrospective leave for a company to be voluntarily wound up, where the application for voluntary winding up had been made in ignorance of an application already on foot by a creditor that the company be wound up in insolvency

Stefanovic v Markovic & Ors (VSC) - mother's will had made inadequate provision for her disabled daughter - family provision order made

CBP Centre Pty Ltd v VentureCrowd Pty Ltd (QSC) - share buy-back agreement construed so as to require the company that had bought back its share to pay the purchase price when the shares were transferred, notwithstanding an ambiguous timing provision that may have nominated a later date for payment

Castronova v Tjung & Ors (NTSC) - vendor recovered damages for breach of contract where the sale of real property did not go through

Summaries With Link (Five Minute Read)

Lehrmann v Network Ten Pty Limited (Costs) (No 2) [2024] FCA 706
Federal Court of Australia
Lee J
Costs in defamation cases - the Court had previously dismissed claims in defamation against Network Ten and a journalist (see Benchmark 16 April 2024) - the Court then awarded the respondents costs against Lehrmann on an indemnity basis except for costs incurred in relation to the statutory qualified privilege defence, which would be on an ordinary or party-party basis, except for certain affidavits for which no costs would be payable, and ordered that the quantification of costs be referred to a referee (see Benchmark 14 May 2024) - Pt VB of the *Federal Court of Australia Act 1976* (Cth) requires that the Court exercise any discretion in a way that facilitates the promotion of the overarching purpose, being the just disposition of disputes according to law and as quickly, inexpensively, and efficiently as possible - it was common ground that Lehrmann was a man of modest means - the Court therefore raised whether it would be better to make fixed costs order to spare the further expense and delay of a reference - the parties agreed, and Network Ten said its costs should be quantified as $2million - held: a total amount of about $3.7million was invoiced and paid by Network Ten in relation to the proceedings - Lehrmann neither consented nor opposed the Court approaching the identification of a fixed figure of costs in a broadbrush way - the division of work within the solicitors firm representing Network Ten had been done appropriately to reflect the differing types of work required to be done by solicitors at different levels of seniority within the firm - the daily rate of senior counsel for Network Ten ($11,000 per day) was at the top of the range of fees charged by members of the inner defamation bar, but this was to be expected, give his seniority, experience, and high reputation in defamation law, and the Court was satisfied this fee was appropriately recoverable - the Court was entitled to proceed on the basis that an experienced solicitor had undertaken the job referred to in Network Ten's supporting affidavit of identifying recoverable costs conscientiously and, in any event, the figures both charged to the client and sought to be recovered did not not seem particularly large given the scope and complexity of the matter - costs of $2million ordered in favour of Network Ten - the journalist deferred quantification of her costs, given the likelihood Lehrmann would not be able to meet the order in favour of Network Ten - the issues of costs as between Network Ten and the journalist also remained unresolved.
Lehrmann

Goldspring v Jordan [2024] NSWCA 158
Court of Appeal of New South Wales
Bell CJ, Leeming, & Harrison JJA

Civil contempt - certain children of a deceased were granted probate - disputes arose with the deceased's other children - the other children, as applicants, sought an order for accounts - a judge ordered the executors file and serve accounts in common form - another judge later ordered the executors file and serve a complete form of accounts, verified by affidavit, as well as documents about estate property - applicants were dissatisfied with the accounts subsequently served, and sought the executors be found in contempt - the primary judge held that the executors had breached the first orders but this breach was technical and a finding of contempt would not be appropriate - the executors had committed civil contempt by breaching the second orders by failing to provide a full account of certain transactions and in failing to produce certain documents - the primary judge declined to revoke the grant of probate and made orders dealing with the specific findings of breach, including for the production of particular documents, and requiring an affidavit as to what happened to documents no longer in the executors' possession, custody, or power (see Benchmark 31 January 2024) - the executors appealed - held: the primary judge had not erred in finding that the executors had failed to produce a full account of the transactions and all documents in relation to a particular and that they had failed to produce documents supporting the certain line entries in a particular spreadsheet - it had been proven that the executors, or someone acting on their behalf, had possession, custody, or power over relevant documents - while it was correct that the relevant orders did not in terms require the production of documents, there is a well-established line of authority that a party that is ordered to provide an account would usually be required to show each receipt and payment, with vouchers such as supporting records and verification on affidavit - therefore, the relevant orders did require the production of documents supporting line entries in the relevant spreadsheet, and that there was no disconformity between those orders and the statement of charge relating to the orders in that respect - certain minor changes made to the orders of the primary judge, but appeal dismissed.
View Decision

Rydzewski v Rydzewski [2024] NSWSC 802
Supreme Court of New South Wales
Richmond J
Contracts - a son (Stan) brought a cross claim seeking to set aside transfers of property the deceased had made to the wife and daughter of another son (Kevin) during her life - Stan his mother had lacked capacity, that the transfers were the result of unconscionable conduct or undue influence, and that the transfers were unjust under the *Contracts Review Act 1980* (NSW) - held: capacity is determined by reference to the particular transaction and asking whether the deceased had capacity to understand the nature of that transaction when it was explained - it is sufficient if the explanation enabled the person to understand the general purport of the transaction - there was insufficient evidence that the mother had lacked capacity - regarding unconscionable conduct, the elements are: (1) the weaker party was at a special disadvantage vis-a-vis the stronger party; (2) the stronger party had knowledge of that special disadvantage; and (3) the stronger party unconscientiously exploited the special disadvantage - it is not necessary that the stronger party acted dishonestly - where special disadvantage and

knowledge is shown, and the transaction is improvident, the evidentiary onus shifts to the stronger party to show that the transaction was fair, just, and reasonable - the mother had been at a special disadvantage existed because of her age (92) and serious ill health - the wife and daughter had known this - the transfers were clearly improvident - the advice given to the mother had not been independent, as the solicitor who gave it acted for Kevin and his wife and daughter - the advice had also been inadequate - the wife and daughter had not discharged their evidentiary onus - the transfers were the product of unconscionable conduct - regarding undue influence, a court of equity will set aside an improvident or substantial transaction that was unconscientiously procured as a consequence of the relationship between the parties to that transaction - mere inequality in bargaining power is not enough - the relationship must be such that the transfer not a free act - some relationships give rise to a presumption of undue influence, but that was not the case here - undue influence was proved here by the same facts that led to the finding of unconscionable conduct - in light of the Court's conclusions as to unconscionable conduct and undue influence, the *Contracts Review Act* issue did not arise - transactions set aside, and properties to be transferred to the estate.
View Decision

In the matter of Resicomm Electrical Pty Ltd [2024] NSWSC 811
Supreme Court of New South Wales
McGrath J
Corporations law - a creditor applied for a company to be wound up in insolvency - this application did not come to the attention of the sole member and controller of the company, who then passed a resolution for the company to be wound up voluntarily - s490(1)(a) of the *Corporations Act 2001* (Cth)provides that, except with the leave of the Court, a company cannot resolve that it be wound up voluntarily if an application for the company to be wound up in insolvency has been filed - the liquidator applied for an order that leave be granted *nunc pro tunc* pursuant to s490(1)(a) for the company to be wound up voluntarily, along with a number of consequential ancillary orders - held: s490(1) confers upon the court a broad discretion as to the factors to be taken into account in determining whether leave should be given - leave in s490(1) can be granted retrospectively - it is ordinarily necessary to establish that it is preferable that the company be wound up voluntarily, rather than compulsorily - the extent of the work already undertaken by the liquidator is a relevant factor because otherwise time will be lost and effort wasted if it was necessary to appoint a new liquidator - it will also be relevant to consider whether the voluntary winding up has proceeded in the face of knowledge of the application for a court-ordered winding up or in ignorance of it, and if in ignorance of it, whether that has been despite all reasonable caution - consideration should be given to whether there would be any difference between the relation-back day arising on the appointment of a court-appointed liquidator and that arising on the appointment of a liquidator pursuant to a members' voluntary winding up, and whether the liquidator has identified any potential voidable transactions which would be affected by a change in the relation-back day - the liquidator had already taken a significant number of important steps in carrying out the liquidation - the petitioning creditor consented to the order - the liquidator had adequately explained how the voluntary liquidation

proceeded despite the filing of the creditor's application, and the Court was satisfied that this arose because the records maintained by ASIC were not kept up to date in a timely fashion - although the liquidator had not yet identified any transactions which might be recoverable as voidable transactions if the company were deemed to have the earlier relation-back day related to the creditor's petition, for the purpose of protecting the interest of creditors, the Cour considered it appropriate to make an order fixing the relation-back day at that earlier date - leave granted *nunc pro tunc*.
View Decision

Stefanovic v Markovic & Ors [2024] VSC 369
Supreme Court of Victoria
Watson J
Family provision - a daughter applied under Part IV of the *Administration and Probate Act 1958* (Vic) seeking further provision for her proper maintenance and support out of the estate of her mother, who had died in 1998 - the daughter's brother had also brought an application but he had died and his claim had been resolved - the daughter had been assessed as demonstrating global cognitive impairments, with results ranging from below the 0.1 percentile to the third percentile - she also had epilepsy, osteoarthritis, diabetes, schizophrenia, and other ailments - under the will, the daughter's only certain entitlement was to have the 'use and occupation' of a particular property pending its sale, and thereafter would have no right to any capital or income from the property but would be entirely dependent on the exercise of discretion by trustees - held: the time for the daughter to apply for a family provision order should be extended - there was no basis for the suggestion that the daughter must have been told by her brother's daughter that she had a right to bring a family provision application based on the brother having made his application - the executors could not point to any prejudice from the delay, and in those circumstances prejudice should not be presumed, notwithstanding the extraordinary length of the delay - the mother had had a moral duty to provide in her will for the daughter's proper maintenance and support - the will did not make adequate provision for the daughter's proper maintenance and support - it was not appropriate to leave the daughter's further provision under the will in any way subject to the discretion of the existing executors, who had wholly failed to properly exercise their discretions so far - the Court was also not persuaded that provision of a flexible life interest to the daughter was appropriate - further provision in the sum of $550,000 should be made for the daughter.
Stefanovic

CBP Centre Pty Ltd v VentureCrowd Pty Ltd [2024] QSC 139
Supreme Court of Queensland
Freeburn J
Contracts - a company bought back all of a shareholder's shares pursuant to a buy-back agreement - the former shareholder sought an order that the company pay the agreed contract price of about $2.4million - the shareholder said the obligation to pay the purchase price arose on "completion" as defined in the contract to mean when the shares were transferred - the

company said the obligation to pay the purchase price arose on the "completion date" as defined in the contract, which had not yet arrived, as it was fixed by reference to a future external capital raising by the company - held: the relevant clause in the contract was ambiguous, as it stated that completion must take place on the "completion date" (which had not yet arrived), but also specified that the price must be paid on completion (which had occurred, as defined) - ordinarily, the completion of a sale would occur when both parties received what they bargained for - whether and when the completion date arrives was completely in the hands of the company - the completion date may never occur, or it may not occur in the foreseeable future - the better interpretation of the provision relating to exchange is that what was contemplated was that both the transfer of the shares and the payment of the transfer price would occur on the same day and time, namely the completion date - that was the interpretation that is most likely to give effect to the objective intention of the parties - a reasonable businessperson could hardly have contemplated that the former shareholder would part with the shares but would have no reciprocal right to the transfer price - there was ambiguity between this provision and the provision relating to timing - that ambiguity should be resolved by giving priority to the provision relating to exchange rather than the timing provision - furthermore, words and even whole clauses may be rejected if they are inconsistent with the main object of the contract, as ascertained from a reading of it as a whole - here, it was clear what was intended, namely that the company had the ability to delay completion of the sale in order to secure funding via an external capital raising, but having decided to proceed with the transaction without such a capital raising, the company was obliged pay for the shares it acquired - judgment for the former shareholder.
CBP Centre Pty Ltd

Castronova v Tjung & Ors [2024] NTSC 55
Supreme Court of Tasmania
Burns J
Contracts - the plaintiff contracted to sell real property to the first and third defendants, and gave them a licence to occupy the property before completion - an extended settlement period was negotiated to enable the defendants sell properties by the first and second defendant - the defendants were unable to complete on the appointed day, and the parties entered into a deed of variation extending the date for completion and granting the plaintiff a mortgage over the first defendant's property and a guarantee from the second defendant and a second ranking mortgage over the second defendant's property - the defendants again failed to complete and the plaintiff terminated the contract - the first defendant contracted to sell her property to a third party, but could not complete, allegedly because the plaintiff refused to discharge the mortgage - the plaintiff then sold its property for $550,000 less than it had contracted to sell it to the defendants - the plaintiff demanded the amount owing under the mortgages - when the defendants failed to pay, the plaintiff commenced proceedings claiming damages for breach of the contract of sale as varied and under the second defendant's guarantee - held: the contract, the variation deed, the deed of guarantee, and the mortgages are not void as unfair contracts under the *Australian Consumer Law* - the first defendant's subjective misunderstanding of the

effect of the variation and the mortgages was not relevant - the Court did not accept that the plaintiff refused to provide a discharge of the mortgage on the first defendant's property and that this was the reason for the first defendant's sale of that property not proceeding - there was no basis for a claim in law or equity for the plaintiff to reimburse the first and second defendants for the costs of renovations to the property - the plaintiff was entitled to $550,000 plus interest and possession of the first defendant's property pursuant to the mortgage.
Castronova

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