

Friday, 26 April 2024

Daily Insurance A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (One Minute Read)

Greiss v Seven Network (Operations) Limited (Costs) (FCA) - Seven ordered to pay partially successful costs, calculated on the basis as if the proceedings had been commenced in the District Court of NSW

TMA Australia Pty Limited v 100% Bottling Company Pty Ltd (NSWCA) - trial judge had not erred in failing to be satisfied that an email exchange said to have constituted an agreement to for a print run of adhesive labels was genuine

Whimp v Scaglia (NSWSC) - Court construed the will of a deceased who had died relatively young and distributed half of her estate among her nieces and nephews

Yang v New South Wales Land and Housing Corporation (NSWSC) - plaintiff had not been under a disability while incarcerated in China or while suffering from a depressive disorder, and his claim was therefore statute barred

Giddings v Sharp (NSWSC) - Court declined to make an order pursuant to s94 of *the Civil Procedure Act 2005* (NSW) that the Register-General sign transfers on behalf of the vendor, but ordered the vendor to complete the transfers

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Summaries With Link (Five Minute Read)

Greiss v Seven Network (Operations) Limited (Costs) [2024] FCA 377

Federal Court of Australia

Katzmann J

Costs in defamation cases - Greiss attended a sentencing hearing in support of the rugby league player, Jarryd Haynes, who had been convicted of sexual assault - Seven had published an article on the 7News website and a Facebook post on the 7News Facebook account - a Seven journalist had published a tweet on her personal Twitter account - the Court had held that the defence of contextual truth succeeded in respect the news report and the tweet, and a defence of honest opinion succeeded regarding the tweet, but that Greiss succeeded with respect to the Facebook post, and the libel involved in this post was serious, and \$35,000 was appropriate to compensate him for his non-economic loss but that there should be no aggravated damages (see Weekly Defamation Benchmark 23 February 2024) - the Court now considered costs - held: s43 of the *Federal Court of Australia Act 1976* (Cth) confers a broad discretion on the Court with respect to costs, relevantly limited only by the need to act judicially and by the obligations imposed by Part VB of the Act, including the obligation imposed by s37M(3) to exercise any power conferred by the civil practice and procedure provisions of the Act and the Rules in the way that best promotes their overarching purpose - further, s40(1) of the *Defamation Act 2005* (NSW) entitles the Court to take into account the way in which the parties conducted their cases and any other matters the Court considers relevant in awarding costs - where there has been mixed success, three aspects generally assume significance (1) whether one party has enjoyed real practical success; (2) the Court is reluctant to assess costs on an issue by issue basis because the Court has an eye to the interests of justice in bringing finality to the dispute and the diminishing returns involved in expending further time and costs in identifying the extent to which costs related to particular aspects of the conduct of the proceedings; and (3) a preference for adjustments by way of percentage reductions made on a broad brush approach taking account of the degree of success and the likely extent of costs associated with that aspect of the case - the journalist should not be required to pay Greiss's costs, as she was only a respondent in relation to the tweet and she had been wholly successful - it was incorrect to say that the respondents only succeeded because of the contextual truth defence, as the facts upon which it was based were also relevant to mitigation of damages - the award of damages had been modest, but not nominal - Greis had not brought the proceedings on a knowingly false basis - there is no particular reason why the proceedings should have been filed in the Federal Court, rather than in the Federal Circuit and Family Court (Division 1) or the District Court of NSW - the most appropriate order was that Seven pay Greiss's costs on a party and party basis, to be calculated as if the proceeding had been commenced in the District Court.

[Greiss](#)

TMA Australia Pty Limited v 100% Bottling Company Pty Ltd [2024] NSWCA 80

Court of Appeal of New South Wales

Bell CJ, Leeming JA, & Basten AJA

Contracts - TMA Australia Pty Ltd was a commercial printer. 100% Bottling Company Pty Ltd was a commercial bottling company, and both had relationships with Metcash, which supplied IGA supermarkets - in 2015, TMA and 100% Bottling explored a possible agreement by which the appellant would take over printing labels, in particular in relation to Black & Gold cooking oil, which was a house brand used by Metcash, and TMA printed 1,000,000 back and front self-adhesive labels for Black & Gold cooking oil - the print run greatly exceeded the purchase orders provided by 100% Bottling over the following three years, and a dispute arose as to whether 100% Bottling was obliged to pay for the whole of the print run within a reasonable time - TMA relied on an alleged exchange of emails which included a direction by 100% Bottling to TMA to undertake the print run forthwith - 100% Bottling alleged the exchange of emails was fabricated - the primary judge in the District Court was not satisfied the exchange of emails was genuine, and held against TMA - TMA appealed to the Court of Appeal - held: the primary judge's findings as to the unreliability of the evidence of TMA's Corporate Accounts Manager were beyond challenge, and those findings may have been generous to that witness - none of the grounds of appeal challenging the primary judge's findings in this respect was maintainable - the trial judge relied on eight matters which led him to a failure to be satisfied on the balance of probabilities that the disputed email exchange occurred, and that conclusion should be upheld - in the Court's view, the case for 100% Bottling was even stronger than the conclusion reached by the trial judge - discussion of "commerciality" during the appeal hearing had proceeded as if that word defined an independent standard against which likelihoods could be measured - that was misleading, as there is no standard of commerciality, but rather there may be business practices which may provide context against which to judge the plausibility of the asserted conduct on both sides of the record - appeal dismissed.

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Whimp v Scaglia [2024] NSWSC 432

Supreme Court of New South Wales

Richmond J

Succession - a deceased died aged 48 in a car accident, leaving an estate of about \$1.5million - her will appointed her uncle and sister as joint executors, although the sister renounced probate - the will gave half of the deceased's estate to the Garvan Institute of Medical Research, and there was no issue that this was a valid gift - the will distributed the remaining half between her nieces and nephews, being the children of her four siblings - the executor sought a declaration as to whether the will, on its proper construction, provided for three trusts in favour of the children of each of three of the deceased's siblings, provided that monies were to be used for no other purpose than purchasing property or education, made provision for any niece or nephew born after the deceased's death, or made provision for any adopted, fostered, or step-child niece or nephew, and also as to the relative size of the parts provided for by the will - held: the object of construction of a will is to give effect to what can be ascertained, having regard to admissible extrinsic evidence, the testatrix intended by the words she used - it is necessary to consider the terms of the will as a whole and seek to ascertain the basic scheme which the

deceased had conceived for dealing with his or her estate and then to construe the will, if possible, to give effect to that scheme - in order for any child of the deceased's siblings to qualify as a beneficiary, that child must survive the deceased and reach 25 years - it was clear from the authorities that the natural and primary meaning of "survive me" in the context of a will is "outlive" and it requires that the person was alive both before and after the death of the testator, but this can be displaced where the will is considered as a whole in the light of the surrounding circumstances - the extrinsic circumstances in this case were consistent with "survive" being used with its ordinary meaning of "outlive" rather than the less restrictive meaning of "live after" - the will did not provide for the creation of three separate trusts - the will did not require certain monies gifted to be used for no purpose other than the acquisition of property or education - the gifts were not limited to such nieces and nephews as were alive at the date of the will, but were limited to children that were alive at the time of the deceased's death - the will did not provide for each beneficiary to receive an equal amount.

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Yang v New South Wales Land and Housing Corporation [2024] NSWSC 428

Supreme Court of New South Wales

Ierace J

Limitation of actions - the plaintiff filed a statement of claim seeking damages from the defendant in tort for breach of a duty of care as the owner of the premises, and voluntary bailment, or conversion, in respect of certain antiques, which he claimed had an "estimated value" at the time of about \$1 million - the defendant asserted that the plaintiff's causes of action, if any, had accrued by no later than the date of an auction at which he had sold the relevant goods, which was more than six years before the plaintiff commenced the proceedings, and therefore the claim was statute-barred - the defendant sought a determination pursuant to r28.2 of the *Uniform Civil Procedure Rules 2005* (NSW) of whether the plaintiff was under a disability in one or both of two periods of time, within the meaning of s11(3) of the *Limitation Act 1969* (NSW) - the alleged disability during the first period was that the plaintiff had been incarcerated in the People's Republic of China for a period of time - the alleged disability during the second period was that the plaintiff had been suffering from a major depressive disorder - held: the terms of s11(3)(b) of the *Limitation Act* are to the effect that, in order for the disability to qualify as one that suspends the limitation period, it must be the reason that the plaintiff was rendered "incapable of, or substantially impeded in, the management of his or her affairs in relation to the cause of action" - the plaintiff had failed to establish that he was "restrained" from contacting an Australian lawyer to commence the cause of action in the sense that term is used at s11(3)(b)(ii), during his period of incarceration - the legal correspondence suggested that, whatever the plaintiff's degree of depressive disorder in the second alleged period of disability, he was not substantially impeded in managing his affairs and taking the necessary steps to commence the action by filing the statement of claim, except for a period of his involuntary admission to St George's Hospital, which was below the threshold of a continuous period of at least 28 days required by s11(3) - therefore, the plaintiff was statute barred from bringing his action by s 14(1)(b) of the Limitation Act.

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Giddings v Sharp [2024] NSWSC 344

Supreme Court of New South Wales

Peden J

Specific performance - Riley (as purchaser) and Sharp (as vendor) executed a contract for the sale of two lots for \$50,000 - the date for completion was left blank - Riley paid Sharp the purchase price in full - Riley's parents, the Giddings (as purchasers) and Sharp (as vendor) executed a contract for the sale of another lot for \$25,000 - the date for completion was again left blank - the Giddings paid Sharp the purchase price in full - Riley and the Giddings (as purchasers) and Sharp (as vendor) then executed a contract for the sale of three further lots for \$66,000 - a date for completion was stated - the purchasers paid Sharp the purchase price in full - Sharp executed paper transfer forms, but they could not be used as the transfer had to take place using PEXA - settlement could not be effected, even after services of notices to complete, and Sharp could not be contacted - the purchasers commenced proceedings, seeking specific performance, and effected substituted service - the purchasers sought that the Registrar-General sign the transfers pursuant to s94 of *the Civil Procedure Act 2005* (NSW) so that the transfers could be registered - held: no submissions were made as to the validity of the notices to complete in circumstances where there was no completion date two contracts and it appeared the entry of a completion date on the contract for sale of the three lots must have been an error - had the paper transfers been taken and registered before PEXA came into operation, no assistance of the Court may have been necessary - there was no evidence from the purchasers as to what is required in the current situation where the transfer has not been lodged and PEXA is now the general conveyancing platform - the plaintiffs expressly disavowed any prayer for relief to order Sharp to finalise his obligations under the contracts for sale - the plaintiffs therefore had to fail, as s94 would not operate until Sharp failed to comply with an order to do something - an order under s94 should not be made where there is merely an anticipated refusal to execute a document, and no submission had been made that an order ought nevertheless be made because of the futility of an order against Sharp - it was appropriate to make an order compelling Sharp to specifically perform all of the contracts, including to complete the transfers via PEXA - if Sharp does not comply with his obligations in the time that will be ordered, the Court noted it would then be prepared to make an order pursuant to s94.

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Poem for Friday

The Song of a Comet

By: Clark Ashton Smith (1893-1961)

A plummet of the changing universe,
Far-cast, I flare
Through gulfs the sun's uncharted orbits bind,
And spaces bare
That intermediate darks immerse
By road of sun nor world confined.
Upon my star-undominated gyre
I mark the systems vanish one by one;
Among the swarming worlds I lunge,
And sudden plunge
Close to the zones of solar fire;
Or 'mid the mighty wrack of stars undone,
Flash, and with momentary rays
Compel the dark to yield
Their aimless forms, whose once far-potent blaze
In ashes chill is now inurned.



A space revealed,
I see their planets turned,
Where holders of the heritage of breath
Exultant rose, and sank to barren death
Beneath the stars' unheeding eyes.
A down contiguous skies
I pass the thickening brume
Of systems yet unshaped, that hang immense[67]
Along mysterious shores of gloom;
Or see—unimplicated in their doom—
The final and disastrous gyre
Of blinded suns that meet,
And from their mingled heat,
And battle-clouds intense,
O'erspread the deep with fire.

Through stellar labyrinths I thrid
Mine orbit placed amid
The multiple and irised stars, or hid,
Unsolved and intricate,
In many a planet-swinging sun's estate.



Of times I steal in solitary flight
Along the rim of the exterior night
That grips the universe;
And then return,
Past outer footholds of sidereal light,
To where the systems gather and disperse;
And dip again into the web of things,
To watch it shift and burn,
Hearted with stars. On peaceless wings
I pierce, where deep-outstripping all surmise,
The nether heavens drop unsunned,
By stars and planets shunned.
And then I rise
Through vaulting gloom, to watch the dark
Snatch at the flame of failing suns;
Or mark
The heavy-dusked and silent skies,[68]
Strewn thick with wrecked and broken stars,
Where many a fated orbit runs.
An arrow sped from some eternal bow,
Through change of firmaments and systems sent,



And finding bourn nor bars,

I flee, nor know

For what eternal mark my flight is meant.

Clark Ashton Smith was born on 13 January, 1893, in Long Valley, Placer County, California. Largely self-taught, he began writing at a very young age, acquiring an exceptionally large vocabulary by reading the dictionary from cover to cover. A protégé of the San Francisco poet George Sterling, Smith achieved recognition at the age of 19 for his collection of poems *The Star Treader* (1912), influenced by Baudelaire, Poe and Sterling. Smith always considered himself a poet first and foremost, however, following the Great Depression, he later turned to writing short stories for pulp magazines such as *Weird Tales* as this was a more lucrative source of income to support himself and his aging parents. He wrote more than 100 short stories between 1929 and 1934, and it is this, along with his friendship with fellow *Weird Tales* contributor H. P. Lovecraft, for which he is remembered today. Smith lived most of his life in Auburn, California, and passed away in his sleep on 14 August 1961, at the age of 68. In addition to his literary activities, he created a large number of drawings, paintings and sculptures which reflected the otherworldly atmosphere of his tales.

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