



Friday, 3 May 2024

Weekly Banking Law Review

Selected from our Daily
Bulletins covering Banking

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Executive Summary (One Minute Read)

Alford v AMP Superannuation Limited (FCA) - approval of the Court granted to discontinue or narrow certain claims in a class action against superannuation trustees

Odelli v Gabrielle (NSWSC) - tenant in common failed to prove trust over the entire property, and trustees for sale should be appointed

Trident Austwide Pty Ltd v Bagcorp Pty Ltd as trustee for the Rico Tea Trust (NSWSC) - a retiring minority partner was entitled to its aliquot share of the value of the business, including goodwill, without deduction on the basis of lack of control and lack of marketability of that share

HABEAS CANEM

Panting pooches



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Summaries With Link (Five Minute Read)

Alford v AMP Superannuation Limited [2024] FCA 332

Federal Court of Australia

Anderson J

Representative proceedings - applicants began a class action against a number of superannuation funds, the trustees of which were subsidiaries of AMP Life Limited and AMP Services Limited - the claims pleaded were broadly that the trustees allowed fees charged to members to be set by other entities within the AMP Group and that the fees referable to administrative services (also provided by entities within the AMP Group) were high compared to those charged by third parties for comparable services in respect of other superannuation funds - the applicants claimed that this amounted to contraventions of the trustees' statutory duties and general law obligations. In relation to the non-trustee respondents, and that other entities were knowingly concerned in, or party to, the trustees' breaches - it became clear that, due to the complexity and nature of the funds, evidence could not be obtained to support a case that a prudent trustee of the funds would have obtained administrative services from a third-party provider or would have negotiated lower fees using the possibility of obtaining such services from a third-party provider as leverage in such negotiations - further, it became clear that closed products or rollover products had complex fee structures which did not lend themselves to the pleaded counterfactual case, and due to the complexity and differentiated nature of those products, evidence could not be obtained to support a case that the relevant administrative services could be obtained from third-party providers or that the fees charged for those products were high relative to competitors - the applicants' counsel therefore expressed the view that the claims lacked reasonable prospects of success and should be withdrawn - the applicants sought the approval of the Court under s33V of the *Federal Court of Australia Act 1976* (Cth) to discontinue certain claims and narrow others - held: the approval of the Court was required both for the discontinuance of the proceedings against certain trustees and for the narrowing of the allegations against other respondents in respect of the closed products or rollover products - the relevant test to apply in determining whether to approve a unilateral discontinuance of claims is whether it is not "unfair, unreasonable, or adverse" to the interests of group members as a whole - the Court agreed with the opinion of counsel expressed in their written opinion that it could not be considered "unfair, unreasonable or adverse" to the interests of group members as a whole for the claims in respect of certain products to be discontinued where the claims lacked reasonable prospects of success.

[Alford](#)

[From Benchmark Wednesday, 1 May 2024]

Odelli v Gabrielle [2024] NSWSC 468

Supreme Court of New South Wales

Parker J

Equity - Gabrielle and a friend acquired an investment property together - the friend died in a boating accident, and the friend's mother ultimately inherited his share - Gabrielle claimed that,

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after the acquisition of the property, the friend and the friend's parents had had nothing to do with it, and that he (Gabrielle) had arranged for it to be tenanted and had used the rent to pay the mortgage and other outgoings - the mother had not made any mortgage payments but said she had made payments towards the rates - the mother commenced proceedings by summons against Gabrielle seeking the appointment of trustees for sale under s66G of the *Conveyancing Act 1919* (NSW) - Gabrielle cross-claimed, contending that the mother held her share of the property on trust for him, which he pleaded in several different ways: an express trust; a common intention constructive trust; and a constructive trust based on "unconscientious" use of the legal title - the mother also sought to amend her summons to allege that she held 57% of the property in equity by way of resulting trust - held: the mother should have set out her proposed 57% claim in pleaded form - although it is common for s66G claims to be brought by way of summons, a claim for a declaration of resulting trust rests on equitable doctrines which depend on the factual circumstances in which the property was acquired, and should usually be pleaded where the facts are disputed - allowing the amended claim would also prejudice Gabrielle - mother refused leave to bring the 57% claim - the Court found Gabrielle's evidence unpersuasive - Gabrielle had not proved his claim that the friend contributed only \$40,000 to the purchase, and that he did so by way of loan - the claim in trust failed - it was common ground that, if Gabrielle's cross-claim failed, there was no defence to the mother's s66G claim - Gabrielle should be given an opportunity, before the Court made an order for appointment of trustees, to decide whether he wished to advance any claims for adjustment based on improvements made to the property and contribution to expenditure on the property.

[View Decision](#)

[From Benchmark Tuesday, 30 April 2024]

Trident Austwide Pty Ltd v Bagcorp Pty Ltd as trustee for the Rico Tea Trust [2024] NSWSC 479

Supreme Court of New South Wales
Hmelnitsky J

Partnership - the parties carried on business as partners in the Madura Tea Estates partnership pursuant to the terms of a written agreement - in 2021, Trident retired from the partnership, having first given notice of its intended retirement some months before - the partnership agreement provided that the partnership would not be dissolved by reason only of the retirement of a partner and contained provisions permitting the remaining partners to purchase the retiring partner's interest as of right at a "fair" value, but the remaining partners did not avail themselves of that right, or cause Trident's interest to be offered for sale - Trident claimed to be entitled to an amount calculated by ascertaining the value of the partnership including goodwill as a whole as at the retirement date, and then multiplying that value by its partnership share of 19% - the remaining partners contended that Trident was entitled to the "market value" of its 19% interest as ascertained by a referee appointed by the Court, which the referee had held would include discounts for lack of control and lack of marketability - held: at common law and in the absence of any agreement, the retirement of a partner usually resulted in the general dissolution of the partnership, and the retiring partner's remedy in the absence of agreement

was for the assets of the partnership to be brought in and sold, the debts paid off, and the surplus distributed after the taking of partnership accounts - Trident's entitlement on account must first be ascertained by reference to the partnership agreement - authority generally supports the taking of an account in these circumstances by calculating the outgoing partners aliquot share of the enterprise value as at the date of retirement - the amount to which Trident was entitled from the continuing partners was an amount equal to its share of the value of the enterprise as a whole as if on a taking of accounts as at that date of retirement, and not simply the amount for which its partnership interest might have been sold to a willing but not anxious purchaser on that date - the remaining partners' reliance on certain authority was misconceived, as Trident was not seeking to sell its partnership interest to anybody, and the "substance of the transaction" was not a sale of its interest to the remaining partners, but, rather, Trident was seeking payment of its entitlement on retirement - this did not involve any unfairness to the continuing partners, as they had had a contractual right to acquire Trident's partnership interest for fair value, which they had declined - the Court adopted the referee's report in its entirety, but that did not mean that it accepted the referee's conclusion as to the market value of Trident's interest - the report allowed the Court to conclude that the amount due to Trident on a proper basis was a particular amount.

[View Decision](#)

[From Benchmark Thursday, 2 May 2024]

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INTERNATIONAL LAW

Executive Summary and (One Minute Read)

R v Secretary of State for the Home Department (UKSC) - Failed asylum seeker who committed criminal acts within the UK and who thwarted his deportation was lawfully refused government benefits and was not denied his rights under the *European Convention on Human Rights*

Summaries With Link (Five Minute Read)

R v Secretary of State for the Home Department [2024] UKSC 13

Supreme Court of the United Kingdom

Lord Lloyd-Jones, Lord Sales, Lord Hamblen, Lord Stephens, and Lady Simler

AM was a national of Belarus. He arrived in the UK in 1998 and claimed asylum. In 2000, he was denied asylum status and removed to Belarus. He was denied entry to Belarus and returned to the UK because he provided Belarus officials with false information that caused the officials to believe that he was not a citizen. Upon his return to the UK, he committed various criminal offences and was classified as a foreign criminal by British authorities. The Government desired to extradite AM to Belarus, but he resisted these attempts. Further, the British authorities refused to grant AM Leave to Remain, which would entitle him to full government benefits. Instead, AM is in 'limbo' status under which (1) he may not seek employment in the UK, (2) he is not entitled to National Health Service benefits, excepting emergency care, (3) he may not open a bank account, (4) he may not enter into a tenancy agreement, and (5) he receives very limited social welfare benefits, at the same level of failed asylum seekers awaiting deportation. Instead, he received a payment card for food, clothing, and toiletries at a subsistence level and government accommodation. As AM may not return to Belarus, he claimed that the British Government's action of placing him in a legal 'limbo' amounted to a denial of his rights under Article 8 of the *European Convention of Human Rights*, and that the Government had to grant him Leave to Remain status that would enable him to obtain full public benefits. Article 8 provides that 'everyone has the right to respect for his private and family life' and that 'there shall be no interference by a public authority in the exercise of this right except as in accordance with law and is necessary in a democratic society in the interests of national security, public safety' - administrative tribunals and then the Court of Appeal agreed with AM, and ordered the Home Secretary to grant AM Leave to Remain status. On review, in a unanimous decision, the Supreme Court reversed the Court of Appeal and held that the Home Secretary did not violate AM's Article 8 rights by placing him in 'limbo' status. The Supreme Court found that AM's attempts to thwart his deportation were highly material factors in evaluating whether the Home Secretary's actions were proportional. The Court added that the



public interest in maintaining effective immigration controls and containing welfare expenditures were relevant considerations. There was also a public interest in maintaining British employment opportunities for those lawfully in the UK. The Court said that, given AM's serious criminal offences, his deportation was in the public interest, and his efforts to undermine that through fraudulent activity were also valid considerations. While AM was entitled to Article 8 protections, the Supreme Court concluded that his extended limbo status was a proportionate means of achieving the lawful aims of the British Government.

[R v Secretary of State for the Home Department](#)



Poem for Friday

Song of Hope

By: Thomas Hardy (1840-1928)

O sweet To-morrow! –
After to-day
There will away
This sense of sorrow.
Then let us borrow
Hope, for a gleaming
Soon will be streaming,
Dimmed by no gray –
No gray!

While the winds wing us
Sighs from The Gone,
Nearer to dawn
Minute-beats bring us;
When there will sing us
Larks of a glory
Waiting our story
Further anon –
Anon!

Thomas Hardy, (2 June 1840 - 11 January 1928), author and poet, was born in Dorset, England. His father was a stonemason, and his mother who was well read, educated Thomas to the age of 8, at which time Thomas commenced as a student at Mr Last's Academy for Young Gentlemen. On leaving school at the age of 16, due to his family's lack of finances to fund a university education, Thomas became an apprentice architect. Much of his work involved the restoration of churches. In 1862 he enrolled at King's College, London. He is best known for his novels, including *Far from the Madding Crowd*, (1874) and *Tess of the d'Urbervilles*, (1891). He was appointed a Member of the Order of Merit in 1910 and was nominated for the Nobel Prize in Literature in that year. He received a total of 25 nominations for the Nobel Prize for literature during his life. Thomas Hardy died of pleurisy on 11 January 1928. He had wanted his body to be buried with his first wife Emma's remains at Stinsford. She had died in 1912 and much of his poetry was inspired by his feelings of grief following her death. His Executor Sir Sydney Carlyle Cockerell compromised by having Thomas Hardy's heart buried with the remains of his first wife Emma, and his ashes interred at Poets' Corner, Westminster Abbey. At the time of his death his estate was worth 95,418 pounds, the equivalent of over 6 million pounds



today. One of the largest literary societies in the world is the Thomas Hardy Society, based on Dorchester, <https://www.hardysociety.org/>.

Song of Hope by Thomas Hardy, read by Dylan Pearse, Music by Irish Folk Group, Kern <https://www.youtube.com/watch?v=Q1qo8sWTi6M>

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