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LAWYERS

Benchmark

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Weekly Banking Law Review

Selected from our Daily Bulletins covering Banking

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Executive Summary (One Minute Read)

JMD Park Pty Ltd v The Ship "Bluefin" (FCA) - arrested ship ordered to be sold pendente lite, as there was no appearance by the owner and the condition of the ship was deteriorating

Lee v Dentons Australia Limited (FCA) - bankruptcy notice had been validly served

Ierna v Commissioner of Taxation (FCA) - income tax objections allowed, as the purpose of the restructure of a business structure that predated the CGT regime was not to distribute profits as capital rather than dividend

The Estate of Lorenzo Antonio Pastrello (NSWSC) - receivers appointed to hotel business after financial irregularities discovered

In the matter of MacDonald Contracting Australia Pty Ltd (in liquidation) (NSWSC) - declaratory relief granted that a fixed and floating charge granted in 2009 had been continuously perfected for the purposes of s56 of the *Personal Property Securities Act 2009* (Cth) and had not vested in the grantor

HABEAS CANEM

Small dog, big surf

Summaries With Link (Five Minute Read)

JMD Park Pty Ltd v The Ship "Bluefin" [2024] FCA 637
Federal Court of Australia
Sarah C Derrington J
Admiralty law - the plaintiff commenced proceedings in rem against the ship "Bluefin", an AIS Class A fishing vessel built in 1981, sailing under the flag of Australia - the ship was arrested in Brisbane by the Admiralty Marshal - the plaintiff claimed there was a debt due and owing for services provided to the Bluefin under a written contract between the plaintiff and the Bluefin's owner - no appearance was entered for the Bluefin - the plaintiff sought judicial sale of the Bluefill, and, if deemed necessary by the Marshal, a valuation - held: s17 of the *Admiralty Act 1988* (Cth) confers a right to commence a proceeding on a general maritime claim against an owner of a ship as an action *in rem* against the ship - r69(1) of the *Admiralty Rules 1988* (Cth), the Court may order that a ship under arrest be valued, valued and sold, or sold without valuation - prima facie, a Court should not order the sale of a ship *pendente lite*, whether or not the action is defended, except for good reason - here, there had been no appearance by the ship owner, the ongoing storage of the Bluefin would prevent the plaintiff from using the space the ship currently occupied, the condition of the ship was deteriorating and thereby running down the value of the potential security for the plaintiff's claim, and there was no caveat or other apparent interest in force in respect of the Bluefin from any party, including in relation to the provision of bail - this was a sufficient basis to order a judicial sale of the Bluefin, *pendente lite* - order made for sale, and that the Marshal engage a shipbroker with relevant experience to advise as to the method of sale and valuation of the Bluefin, if the Marshal considered a valuation necessary or desirable for the purpose of the sale.
JMD Park Pty Ltd
[From Benchmark Monday, 17 June 2024]

Lee v Dentons Australia Limited [2024] FCA 622
Federal Court of Australia
Cheeseman J
Bankruptcy - application for review of decision of Registrar to dismiss application to set aside bankruptcy notice - held: power to set aside a bankruptcy notice is not expressly conferred by the *Bankruptcy Act 1966* (Cth), but arises by necessary implication pursuant to the general powers conferred by s30(1) of that Act - the *Federal Court (Bankruptcy) Rules 2016* (Cth) provide the power may be exercised by a Registrar if the Court or a Judge so directs, and the Chief Justice had made such a direction - a review of a decision of a Registrar under s35A(5) of the *Federal Court of Australia Act 1976* (Cth) is by way of hearing *de novo*, and is not directed to a consideration of the correctness of the Registrar’s decision or redressing error by the Registrar - substituted service orders, on their proper construction, had not precluded service of the bankruptcy notice being effected by one of the alternative modes of service set out in r102 of the *Bankruptcy Regulations 2021* (Cth) - the bankruptcy notice had served in accordance with r102 of the *Bankruptcy Regulations* - further, the application to set aside the bankruptcy

notice was not made before the expiration of time fixed for the compliance with the notice - application for review of Registrar's decision dismissed.
Lee
[From Benchmark Tuesday, 18 June 2024]

Ierna v Commissioner of Taxation [2024] FCA 592
Federal Court of Australia
Logan J
Income tax - before the commencement of the CGT regime, two men founded a street wear business through a unit trust - in 2016, the units in the trust were disposed of as part of a restructure - the Commissioner took the view that, even though the units were pre-CGT assets, s45C of the *Income Tax Assessment Act 1936* (Cth) applied to a capital benefit of $26million derived by each founder, and that capital benefit was therefore taken to be an unfranked dividend and part of assessable income - the Commissioner disallowed objections, and the founders appealed to the Federal Court - held: the language of s45B(8)(a) is narrow in that the existence of profits in a company or associate must actually be a contributory cause of a decision to return capital - amendments to income tax legislation have "tracked" the amendments to corporations legislation - s45B is an anti-avoidance measure to ensure companies do not distribute profits as capital rather than dividend - the question was whether, objectively, the capital benefit received was "attributable to" (in the sense of actually caused by or sourced in) the relevant company's share capital account, or was it, as the Commissioner contended, sourced in an increase in value of the units (from $1 to about $2.5million each) realised by the restructure - the Commissioner's position did not survive an objective examination of the whole of the circumstances, informed by reference to considerations in s45B(8) - the relevant company was newly formed, and had no pattern of distributions of dividends, bonus shares and returns of capital or share premium, and neither did any associate - even looking at pre-existing entities within the group, there was no pattern of dividend payments which, objectively, would support a conclusion that the $52million was a substitute for a payment from profits - s45B had no application to the "scheme" as postulated by the Commissioner, and so there was no basis for a determination under s45C - Part IVA of the *Income Tax Assessment Act 1936* also had no application - from any objective examination of the facts in light of the considerations specified in s177D, the dominant purpose of the "scheme" was never avoid the inclusion of a $26 million dividend in each assessable income - objectively, the dominant purpose was always to use pre-CGT assets, namely units in the unit trust, to repay Division 7A loans made to the founders - appeals allowed, objection decisions set aside, and objections allowed in full.
Ierna
[From Benchmark Thursday, 20 June 2024]

The Estate of Lorenzo Antonio Pastrello [2024] NSWSC 734
Supreme Court of New South Wales
Slattery J

Equity - a deceased and his family had built a thriving hotel and holiday park businesses on the Federal Highway just outside the ACT - at the time of his death, the deceased had held one share in the company conducting the hotel business, and one share the company running the holiday park business - an *Anton Piller* search order, issued because of demonstrated cash deficiencies in the operations of the hotel business, revealed unexplained cash in a safe at the residence of the deceased's eldest son, who was the licensee of an ran the hotel business - the Court appointed a supervisor of the hotel business, without formally appointing the supervisor as a receiver, or giving him direct authorisation to conduct the hotel business - the supervisor found unaccounted for cash banked from and held on the hotel premises, and sought to be appointed as receiver and manager of the hotel business - the eldest son sought that different receivers be appointed, and sought to ensure that the scope of the receivership did not include the holiday park business - held: the Court may, at any stage of proceedings, on terms, appoint a receiver by interlocutory order in any case in which it appears to the Court to be just or convenient so to do, pursuant to s67 of the *Supreme Court Act 1970* (NSW) - it is a remedy that ought to be exercised with care and caution and as a last resort - the supervisor and another person should be appointed receivers and managers as sought - the holiday park business should not be included in the receivership - the intermingling of finances between the hotel business and the holiday park business should not be so great as to create difficulties in separating the accounting for the two.
View Decision
[From Benchmark Wednesday, 19 June 2024]

In the matter of MacDonald Contracting Australia Pty Ltd (in liquidation) [2024] NSWSC 729
Supreme Court of New South Wales
McGrath J
Personal property securities - MCA was incorporated in 2007 and carried on business as a civil construction contractor, providing services including the drilling and installation of temporary and permanent ground anchors, rock bolting and rock face stabilisation, soil nailing, micro piling and shot concreting - in 2023, MCA was placed into a members' voluntary liquidation - the same person was the sole director of MCA and of Tarenast, which engaged in the business of hiring out plant and construction equipment - Tarenast applied for a declaration that a fixed and floating charge granted by MCA to Tarenast in 2009 had been continuously perfected for the purposes of s56 of the *Personal Property Securities Act 2009* (Cth) (PPSA) and had not vested in MCA by the operation of either s588FL of the *Corporations Act 2001* (Cth) or s267 of the PPSA - held: the terms of the Tarenast security interest plainly fall within the definition of a "security interest" in s12 of the PPSA - the Tarenast security interest was both a "transitional security interest" under s308 of the PPSA and a "migrated security interest" under s 332 - therefore, subject to the Court's determination concerning purported defects in the registration, the registration of the Tarenast security interest did not cease to become effective, and as such was continuously perfected during the relevant period - the Court rejected the argument that the Tarenast registration was ineffective by reason of one or more seriously misleading defects and

that it therefore vested in MCA - the Tarenast security interest did not vest in MCA upon the winding up of MCA by operation of s588FL(4) of the *Corporations Act* or either of s267 or s267A of the PPSA - declaratory relief granted.
View Decision
[From Benchmark Thursday, 20 June 2024]

Executive Summary and (One Minute Read)

Food and Drug Administration v Alliance for Hippocratic Medicine (SCOTUS) - Plaintiff pro-life doctors and medical associations challenged Food and Drug Administration (FDA) decision to relax prescribing restrictions on a drug used to terminate pregnancies. The Court held the plaintiffs lacked standing to challenge the FDA decision

Summaries With Link (Five Minute Read)

Food and Drug Administration v Alliance for Hippocratic Medicine [2024] 602 US ___
Supreme Court of the United States
In 2021, the Food and Drug Administration (FDA) relaxed regulations for prescribing mifepristone, an abortion drug, to make the drug more accessible to women. The plaintiffs, consisting of pro-life doctors and medical associations, brought suit, alleging that the FDA regulations violated the *Administrative Procedure Act*. The District Court granted plaintiffs an injunction. The Court of Appeals found that plaintiffs had standing to sue and were likely to win on the merits. Reversing the lower courts, a unanimous Supreme Court held that the doctors and medical societies lacked standing to bring suit. Article III of the US Constitution limits the jurisdiction of federal courts to actual cases and controversies. The Court said that this is a matter of separation of powers. General complaints about how the government conducts its business are matters for the legislative and executive branches, not the judiciary. To establish standing, a plaintiff must demonstrate that (1) the plaintiff will likely suffer an injury in fact; (2) that the injury would likely be caused by the defendant; and (3) that the injury can be redressed by judicial relief. The plaintiffs are pro-life and do not prescribe the abortion drug. Nothing contained in the FDA regulations requires doctors to prescribe this drug. In short, the plaintiffs are acting to restrict the availability of the drug to others. While plaintiffs argued that they have suffered injury because doctors may suffer conscience objections when forced to perform abortions or perform abortion related treatment, the argument failed because federal conscience laws explicitly protect doctors from being required to perform abortions or other treatment that violates their consciences. The Court also rejected arguments that, if plaintiffs were not allowed to sue, then no one would have standing to challenge the FDA's actions. The Court said that even if this were true, it could not create standing and that some issues must be dealt with through the political and democratic processes and not the courts.
Food and Drug Administration

Poem for Friday

"Hope" is the thing with feathers (314)

By Emily Dickinson (10 December, 1830-15 May, 1886)

Hope is the thing with feathers -
That perches in the soul -
And sings the tune without the words -
And never stops - at all -

And sweetest - in the Gale - is heard -
And sore must be the storm -
That could abash the little Bird
That kept so many warm -

I've heard it in the chillest land -
And on the strangest Sea -
Yet - never - in Extremity,
It asked a crumb - of me.

Emily Dickinson https://en.wikipedia.org/wiki/Emily_Dickinson
Emily Dickinson Museum https://en.wikipedia.org/wiki/Emily_Dickinson_Museum

Hope is the thing with feathers, sung by Nazareth College Treble Choir, Linehan Chapel, Nazareth College
https://www.youtube.com/watch?v=gDlSo4hEzmE

Recitation by **Patricia Conolly**. With seven decades experience as a professional actress in three continents, Patricia Conolly has credits from most of the western world's leading theatrical centres. She has worked extensively in her native Australia, in London's West End, at The Royal Shakespeare Company, on Broadway, off Broadway, and widely in the USA and Canada.
Her professional life includes noted productions with some of the greatest names in English speaking theatre, a partial list would include: Sir Peter Hall, Peter Brook, Sir

Laurence Olivier, Dame Maggie Smith, Rex Harrison, Dame Judi Dench, Tennessee Williams, Lauren Bacall, Rosemary Harris, Tony Randall, Marthe Keller, Wal Cherry, Alan Seymour, and Michael Blakemore.

She has played some 16 Shakespearean leading roles, including both Merry Wives, both Viola and Olivia, Regan (with Sir Peter Ustinov as Lear), and The Fool (with Hal Holbrook as Lear), a partial list of other classical work includes: various works of Moliere, Sheridan, Congreve, Farquar, Ibsen, and Shaw, as well as roles such as, Jocasta in Oedipus, The Princess of France in Love's Labour's Lost, and Yelena in Uncle Vanya (directed by Sir Tyrone Guthrie), not to mention three Blanche du Bois and one Stella in A Streetcar Named Desire.

Patricia has also made a significant contribution as a guest speaker, teacher and director, she has taught at The Julliard School of the Arts, Boston University, Florida Atlantic University, The North Carolina School of the Arts, University of Southern California, University of San Diego, and been a guest speaker at NIDA, and the Delaware MFA program.

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