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Benchmark

Friday, 28 June 2024

Weekly Banking Law Review

Selected from our Daily Bulletins covering Banking

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Executive Summary (One Minute Read)

Gordon v The Vessel "Southern Star" (FCA) - Admiralty law - orders made permitting a Sydney Harbour party boat to trade while under arrest

Lien v Huang (NSWSC) - interlocutory injunction against sale of land discharged on the basis of the balance of convenience - the principle that damages are not an adequate remedy for loss of land is not absolute, particularly where the rights of innocent third parties are involved

In the matter of Openpay Group Ltd (recs and mgrs apptd) (subject to a DOCA) (NSWSC) - leave granted to administrators to transfer all shares to the proponent of a DOCA, as the evidence showed the shares had nil value, and there was thus no prejudice to shareholders

Seddone v Commonwealth Bank of Australia (WASCA) - extension of time to appeal against consent orders refused, as there had been nothing arguably procedurally unfair in the making of the consent orders

McCagh v Rural Bank (WASCA) - borrowers failed in appeal against judgment given after a trial in which they had refused to participate

HABEAS CANEM

First beach holiday

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Summaries With Link (Five Minute Read)

Gordon v The Vessel "Southern Star" [2024] FCA 674
Federal Court of Australia
Stewart J
Admiralty law - the plaintiff commenced a proceeding *in rem* for maritime claims against a Sydney Harbour party boat (described by the Court as a well-known type of vessel more often heard than seen) and sought an arrest warrant - the plaintiff claimed sums amounting to less than $10,000 - three other creditors lodged caveats against release, also for small amounts - the boat was arrested - the owner of the boat applied for urgent release, as the boat had a charter the evening of that day - the owner claimed it had a cross-claim for nearly $30,000 against the plaintiff arising from damage caused to the boat - the owner also disputed two of the three caveators' claims, and said that it would immediately pay the third caveator's claim - the parties agreed to release from arrest on provision of a letter of undertaking, but this process would take more than a day - the Court therefore considered whether the vessel should be permitted to trade while under arrest - held: the power under r50 of the *Admiralty Rules 1988* (Cth) to make orders with respect to the preservation, management, or control of an arrested ship is broad - it was likely that long-term security would be agreed within a few days - the boat was required for previously arranged employment, and loss of that employment would cause losses to the owner, which might potentially be passed on to the plaintiff under s34 of the *Admiralty Act 1988* (Cth) as damages for the maintenance of an arrest unreasonably and without good cause - those losses might exceed the plaintiff's claim and arrest expenses - the plaintiff's claim was very small and would in a relatively short time be overtaken by the arrest costs, particularly if the Marshal, and through the Marshal, the plaintiff, had to pay for the berthing of the vessel whilst under arrest - orders made permitting the vessel to trade while under arrest.
Gordon
[From Benchmark Monday, 24 June 2024]

Lien v Huang [2024] NSWSC 761
Supreme Court of New South Wales
Hmelnitsky J
Equity - the plaintiff owned real property at Chatswood the plaintiff's son lived in the property with his wife, until their divorce in 2018 - the wife asked for half of the property, but the son said it belonged to the plaintiff and was not his to give - the plaintiff and his son both moved back to Taiwan - the son returned to Australia in 2024 and discovered that the property had been transferred into the name of his ex-wife (a licenced conveyancer) for consideration of $1, and the ex-wife had entered into a contract to sell it for $4.5million with completion pending - the ex-wife had had early access to the deposit and had used it as a deposit for the purchase of another property at Artarmon, where completion was also pending - the father obtained an urgent interlocutory restraint against the completion of the sale of the Chatswood property and a freezing order against the assets of the ex-wife - the ex-wife claimed that the plaintiff had

consented to the transfer - the ex-wife now sought that the injunction be discharged to allow both sales to complete, with the freezing order continued to apply to the net proceeds of sale of the Chatswood property - held: the plaintiff had demonstrated a relatively strong prima facie case but it was not possible to reach a firm conclusion as to whether he would ultimately succeed - if the injunction were continued, the purchaser of the Chatswood property would be deprived of its right to complete the purchase of that property - further, the vendor of the Artarmon property would lose the benefit of her contract, and the deposit for the Artarmon property would likely be forfeited, making the return of the deposit for the Chatswood property extremely difficult if not impossible for the ex-wife, at least in the short term - on the other hand, if the injunction were discharged, the plaintiff would lose any prospect of recovering title to the Chatswood property - the plaintiff said the Chatswood property had sentimental value to him and that he may wish to return to it someday, and that he did not consider damages an adequate remedy - there is a long line of authority that real property is unique and damages are not an adequate remedy - this proposition is not absolute - in all cases where an injunction is sought, the Court must determine what is "just and convenient", having regard to s66(4) of the *Supreme Court Act 1970* (NSW) - the Court must take account of the position third parties - the purpose of an interlocutory injunction is to preserve the status quo pending trial, but exactly what this means will vary from case to case - here, where the interests of third parties were involved and where the father's economic position could be sufficiently protected by the continuation of the freezing order, the balance of convenience favoured discharge of the injunction - injunction discharged and freezing order continued - costs as between the plaintiff and ex-wife reserved, and the plaintiff and ex-wife to pay the Chatswood purchaser's costs with any such costs actually paid to be that party's costs in the cause.
View Decision
[From Benchmark Monday, 24 June 2024]

In the matter of Openpay Group Ltd (recs and mgrs apptd) (subject to a DOCA) [2024] NSWSC 789
Supreme Court of New South Wales
Black J
Corporations law - Openpay was listed on the ASX and was the parent company of several companies which primarily operated a "buy now pay later" service - the group aimed to extend its business to operate a platform which allowed consumers to complete transactions up to a limit of $20,000 with repayment terms of up to 24 months over a range of industries including automotive, healthcare, home improvement, education and retail - in due course, it entered into a trading halt and receivers and manages, and then voluntary administrators, were appointed - the voluntary administrators sought leave under s444GA of the *Corporations Act 2001* (Cth) to transfer all the shares in Openpay to the proponent of a Deed of Company Arrangement Openpay had entered into“ held: the possibility of prejudice to a shareholder would arise if there was some residual equity in the company - it was difficult to see how shareholders could be prejudiced by the transfer of their shares in the absence of any residual value or equity in the company - the case law established that there would not ordinarily be any prejudice, or no

prejudice that has the requisite quality of "unfairness", if the shares had no value and there would be no distribution in the event of a liquidation, which was the only realistic alternative to the proposed transfer - the Administrators bore the legal onus of proving that the Court's discretion to allow the share transfer should be exercised in their favour - an independent expert had valued the shares on an orderly realisation of assets basis, and the Court accepted that other methodologies such as a cash flow basis, a multiple of earnings method, or a quoted price for listed securities basis, were not available or were not appropriate - the Court accepted that the shares had nil value - the recoveries identified by the Administrators in a liquidation scenario would be insufficient to repay creditors in full - there was no prejudice to shareholders in the orders sought by the Administrators being made, let alone unfair prejudice - orders made as sought.
View Decision
[From Benchmark Friday, 28 June 2024]

Seddone v Commonwealth Bank of Australia [2024] WASCA 70
Court of Appeal of Western Australia
Mitchell J
Consent orders - a bank commenced proceedings against Seddone and Prohaska for default on a loan - orders were made as proposed by the bank with Seddone's consent - about five years later, Seddone sought to appeal against he orders - held: Seddone's complaint of a failure to accord procedural fairness was to be assessed in the context where she consented to the order granting judgment in favour of the bank - Seddone did not seek to place any evidence or submissions before the court in opposition to the bank's summary judgment application - when the matter came on for hearing before a master, the bank's counsel explained its proposal, Seddone was given four weeks to consider the proposal and obtain legal advice in relation to it, and then, when the matter came on for hearing again before an acting master, Seddone indicated that she consented to the orders proposed by the bank - the acting master had no obligation to interrogate Seddone about her understanding of the agreement or the state of her mental health - there is no evidence that Seddone misunderstood what was proposed by the bank or was incapable of understanding and participating in the hearing - if the orders were not going to be made by consent, the acting master indicated that Seddone would have a short further opportunity to file material in opposition - there was nothing arguably procedurally unfair about the primary court's approach - the bank's proposal was not commercially unreasonable - applications for extension of time to appeal, and for leave to appeal, refused.
Seddone
[From Benchmark Tuesday, 25 June 2024]

McCagh v Rural Bank [2024] WASCA 68
Court of Appeal of Western Australia
Mitchell, Vaughan, & Vandongen JJA
Banking - a bank sued borrowers to recover money claimed to be owing under five finance facilities - the borrowers did not defend the trial, and the primary judge gave judgment for the

bank for about $10million and ordered the borrowers to give possession of mortgaged agricultural land to the bank - two of the borrowers appealed - held: the appellants had made a deliberate choice not to defend the trial - after correspondence with the Court regarding available dates, the appellants had informed the Court that they were withdrawing from any participation in the trial - O34r2 of the *Rules of the Supreme Court 1971* (WA) provides that, when a trial is called on, if a party does not appear the judge may proceed with the trial in the absence of that party - O34r2 provides a mechanism for the absent party to apply to set aside any judgment given, but the appellants had not proceeded in that way, and sought to appeal against the judgment - in the absence of the borrowers at trial it remained necessary for the bank to prove its claim so far as the legal onus of proof rested on the bank - however, an appellant who does not appear at trial cannot assert error by the primary judge merely because the appellant's absence at trial made it easier for the other party to adduce evidence and prove its case - further, such an appellant cannot allege that the primary judge was in error for failing to consider arguments that the appellant now seeks to run on appeal - the borrowers' election not to participate in the trial had the result that there was no evidence whereby it was incumbent on the primary judge to consider and determine all of the issues raised in the borrowers' defence and counterclaim - appeal dismissed.

McCagh

[From Benchmark Thursday, 27 June 2024]

Executive Summary and (One Minute Read)

United States v Rahimi (SCOTUS) - Federal statute that prohibits individuals who are subject to a domestic violence restraining order from firearm possession does not violate the Second Amendment right to keep and bear arms

Summaries With Link (Five Minute Read)

United States v Rahimi 602 US __ (2024)
United States Supreme Court
In an 8-1 decision (Thomas, J dissenting), the Supreme Court upheld the validity of what are known as 'red flag' laws that prohibit firearm possession by domestic abusers. During a dispute with his girlfriend, Rahimi fired a gun that he kept in his car. She obtained a restraining order from a court in Texas. The Texas Court further suspended Rahimi's gun license for two years on the grounds that the violence was likely to occur again. During this period, Rahimi threatened additional women with a gun and was a suspect in an additional five shootings. When police searched his home, they found firearms, ammunition, and a copy of the restraining order. Rahimi was indicted for violating a federal statute that prohibits firearm possession while subject to a domestic violence restraining order. Rahimi claimed that the statute was unconstitutional because it established a restriction on the right to keep and bear arms that was not part of firearm regulation at the time the Second Amendment was adopted in the 18th Century. The District Court rejected this argument, but the US Court of Appeals agreed that the statute was unconstitutional. In the opinion by Roberts CJ, the Court pulled back from a purely historical approach to gun rights. The Chief Justice stated that recent court decisions expanding firearm rights 'were not meant to suggest a law trapped in amber'. By this the Court moved away from the history and tradition test and recognised that the Second Amendment permits regulations that may not have existed in 1791. The Court held that, while the right to keep and bear arms was a fundamental right, prohibitions on going armed were accepted as part of the common law at the time the Second Amendment was adopted. The Court said that the statute only prohibited possession while the restraining order was in effect and where a court had found that the individual represented a credible threat to the physical safety of others in a domestic situation.
United States v Rahimi

Poem for Friday

Adlestrop

By Edward Thomas (1878-1917)

Yes. I remember Adlestrop
The name, because one afternoon
Of heat the express-train drew up there
Unwontedly. It was late June.

The steam hissed. Someone cleared his throat.
No one left and no one came
On the bare platform. What I saw
Was Adlestrop only the name

And willows, willow-herb, and grass,
And meadowsweet, and haycocks dry,
No whit less still and lonely fair
Than the high cloudlets in the sky.

And for that minute a blackbird sang
Close by, and round him, mistier,
Farther and farther, all the birds
Of Oxfordshire and Gloucestershire.

Edward Thomas, an English poet biographer, author, essayist, and critic was born on 3 March 1878, the son of Welsh parents, a railway clerk, politician and preacher Phillip Thomas, and Mary Townsend. His connection to Wales was important throughout his life. He was described by Aldous Huxley as "*one of England's most important poets*". Thomas wrote poetry from 1914, when he was 36, encouraged by his new neighbour, the then relatively unknown Robert Frost. During his life, his only published poetry was *Six Poems* (1916) under the pseudonym Edward Eastaway. Thomas struggled with the burden of constant production of what some critics described as "hack work" to support his family, and the work he wished to produce. At times he was reviewing up to 15 books each week. He made many attempts at suicide, suffering marital disharmony and depression. Adelstrop is considered one of Thomas' finest poems. The poem describes the ordinary circumstances of Thomas' train from Paddington to Malvern, stopping at Adlestrop station at 12:15pm with images of the surrounding English countryside. However the poem elicits profound feelings in the reader through those descriptions. Thomas was killed in the Battle of Arras, in France on 9 April 1917, having enlisted for service in the British infantry in 1915. Ted Hughes described Thomas as "*the father of us*

all".

Adestrop by Edward Thomas, composed by Susanna Self- the third of six "Songs of Immortality"
https://www.youtube.com/watch?v=2NYUdo12yfg

Reading 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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