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Benchmark

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Weekly Business Law

A Weekly Bulletin listing Decisions of Superior Courts of Australia covering Business Law

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Executive Summary (One Minute Read)

Cui v Salas-Photiadis (NSWSC) - order withdrawing caveat refused after parties let settlement go through in PEXA while the caveat was in place

Firmtech Aluminium Pty Ltd v Xie; Zhang v Xu; Xie v Auschn Conveyancing & Associates Pty Ltd (NSWSC) - director and general manager of company had breached their statutory directors' duties and their fiduciary duties by doing work for competing companies that one of them owned

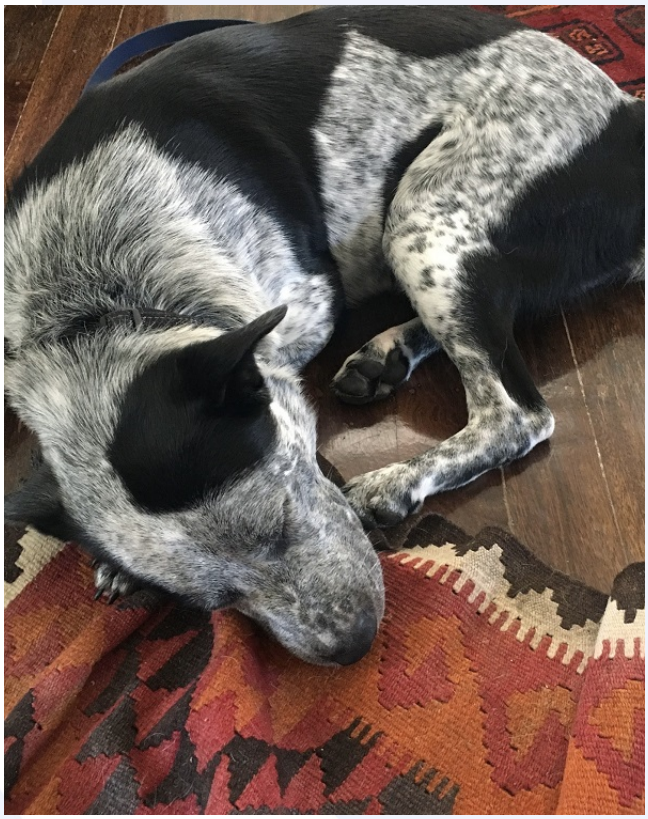
Thousand Hills Property Pty Ltd v LBA Capital Pty Ltd (VSC) - a purchaser under a property development contract had not repudiated the contract, when an email that seemed on its face to constitute a repudiation was seen in its full context

D & L Events Pty Ltd v Opetaia (QSC) - a boxer had been entitled to terminate a promotion contract, as the conduct of the promoter had amounted to a repudiation

Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd (WASCA) - appeal dismissed against judgment that held the hirer of a loader liable for breach of contract and in negligence for a fire that had destroyed the loader

HABEAS CANEM

Peace



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Summaries With Link (Five Minute Read)

Cui v Salas-Photiadis [2024] NSWSC 1280
Supreme Court of New South Wales
Hmelnitsky J
Caveats - the plaintiff entered into a contract to purchase a home from the second defendant, borrowing funds from a bank who was to be the incoming mortgagee - the first defendant lodged a caveat over the property, relying on an interest under a "charge" granted under a loan agreement relating to building work done by the first defendant - no participant in the PEXA workspace noticed that the first defendant's caveat had been lodged - on settlement in PEXA, documents were lodged with Land Registry Services, and the funds were disbursed in accordance with the financial settlement schedule - the following day, the bank received a requisition from Land Registry Services informing it that the transfer and mortgage could not be registered because of the first defendant's caveat - the plaintiff sought an order that the caveat be withdrawn under s74MA of the *Real Property Act 1900* (NSW) - held: an equitable charge may or may not take the form of an equitable mortgage - the caveator's reference to a "charge" in the caveat did not necessarily invoke the definition of "Charge" in the *Real Property Act* - the caveat therefore did not fail sufficiently to specify the first defendant's claimed interest merely because it described a claimed equitable mortgage as a charge - under s7D of the *Home Building Act 1989* (NSW), an agreement which purports to grant security for the payment of the consideration payable under a contract to do residential building work is an "other agreement" within the meaning of that provision - the loan agreement here was therefore within the scope of s7D to the extent it purported to secure payment for residential building work - however, s7D left the balance of the loan agreement intact - the mere failure of the caveat to specify the amount secured is not a sufficient reason to set the caveat aside - the first defendant had demonstrated that it had a good arguable case that the caveat had substance - the balance of convenience favoured the continuation of the caveat until such time as the rights of the parties can be dealt with on a final basis, which would inevitably include a contest as to the parties' competing priorities - order under s74MA refused and matter listed for directions on the Real Property List.
View Decision
[From Benchmark Wednesday, 16 October 2024]

Firmtech Aluminium Pty Ltd v Xie; Zhang v Xu; Xie v Auschn Conveyancing & Associates Pty Ltd [2024] NSWSC 1293
Supreme Court of New South Wales
Nixon J
Directors' duties - in 2018, Xu and a married couple, Zhang and Xie, agreed to establish Firmtech Aluminium Pty Ltd to manufacture and instal aluminium windows and doors and perform faÃ§ade works - Xu and Zhang were directors and 50% shareholders, and Xie was the general manager - Xu provided capital and Zhang and Xie provided industry experience and contacts - while they were director and general manager respectively, Zhang and Xie also did work in competition with Firmtech, and then informed Xu they wished to end their association

with Firmtech - the parties agreed to sell two investments properties they also owned together - Xu's company, Auschn, acted as conveyancer, and Zhang and Xie claimed that Xu had caused this company to make various unauthorised payments of the sale proceeds - Xu and Firmtech sued Xhang, Xie, and the other companies they had worked through, for breach of directors' duties and fiduciary duties - Zhang and Xie also sued Xu regarding the payments made from the sale proceedings for breach of contract and breach of fiduciary duties - held: the Court was not satisfied that there was an express contractual obligation to the effect that Xie would take all steps necessary to ensure that her other company did not operate a business in competition with Firmtech, but it did not then follow that Xie was free to compete with Firmtech - each of Xie and Zhang owed duties not to improperly use their position to gain an advantage for themselves or someone else, or to cause detriment to Firmtech, under s182 of the *Corporations Act 2001* (Cth) - Zhang and Xie had promoted their personal interests, without informed consent, by pursuing and making a gain for Xie's companies where there was a conflict between their personal interests and the interests of Firmtech - they had thereby breached their statutory and fiduciary duties - Xie's company were involved in these contraventions and were also liable under the second limb of *Barnes v Addy* and s79 of the *Corporations Act* - Firmtech was entitled to an account of profits - the payments made by Xu's conveyancing company from the sale proceedings had been authorised, and these claims should be dismissed.
View Decision
[From Benchmark Friday, 18 October 2024]

Thousand Hills Property Pty Ltd v LBA Capital Pty Ltd [2024] VSC 597
Supreme Court of Victoria
Gorton J
Construction contracts - LBA Capital contracted with Thousand Hills Property for the purchase of 14 lots together with any improvements on those lots - under the contract, Thousand Hills promised to construct apartments on the property in accordance with plans that were annexed to the contract - LBA paid a deposit - LBA sent an email to Thousand Hills stating that it was in the process of winding down, and was unable to continue operating, and would not be in a position to settle - Thousand Hills said it accepted this repudiation - Thousand Hills contended it was entitled to retain the deposit - LBA denied it repudiated the contract and said Thousand Hills must return the deposit with interest - Thousand Hills applied under s49 of the *Property Law Act 1958* (Vic) for the Court two answer the question whether LBA repudiated and Thousand Hills accepted that repudiation - held: a party repudiates a contract if it evinces an intention no longer to be bound by the contract, and it may also repudiate a contract if it conveys that it is unable to meet its contractual obligations even if it wished still to do so - the question is not what the party intended to convey, but what its words and actions would convey to a reasonable person in the position of the other party - however, an intention not to be bound by a contract will not be found lightly - LBA's email in this case had been sent at the express request of Thousand Hill's agent as the first step towards a mutual variation or cancellation of the contract, as a dispute had arisen as to whether Thousand Hills was required to construct the apartments in accordance with NDIS standards and associated delays - when the email said to

have constituted a repudiation was seen in its full context, it was apparent that, despite its unfortunate and largely inexplicable wording, it would not in the unusual circumstances of this case have conveyed to the reasonable person in Thousand Hill's position that LBA did not consider itself bound by the contract or that LBA would not be able to complete the contract - LBA had not repudiated the contract - the deposit was not forfeited and must be repaid.
Thousand Hills Property Pty Ltd
[From Benchmark Friday, 18 October 2024]

D & L Events Pty Ltd v Opetaia [2024] QSC 245
Supreme Court of Queensland
Cooper J
Contracts - D & L Events and Opetaia executed a boxer promotion contract in 2019 under which Opetaia appointed D & L Events as his exclusive promoter - in 2022, Opetaia won the International Boxing Federation world cruiserweight championship - to the end of 2022, D & L Events was contracted by Fox Sports to produce lineal shows and pay-per-view shows for broadcast on Foxtel and the Main Event PPV service - early in 2023, Opetaia purported to terminate the promotion contract, claiming that D & L Events had repudiated the contract by losing its Foxtel contract - D & L Events said the purported termination was wrongful and itself amounted to a repudiation, and elected to affirm the contract - D & L Events commenced proceedings seeking a declaration that the purported termination was invalid - the Court refused interlocutory relief, and Opetaia signed a contract with a different promotor - by the time of trial, D & L Events he elected to treat the contract as at an end, and sought damages - held: repudiation of a contract is a serious matter and is not to be lightly found or inferred - where factual inability to perform is relied upon, what needs to be shown is that the defaulting party has become wholly and finally disabled from performing the essential terms of the contract - the contract was predicated on the assumption that most, if not all, of Opetaia's fights would be promoted by D & L Events, televised on Fox Sports or its Main Event PPV service, and (at least in the case of a world title fight) result in potentially significant PPV revenue for Opetaia - however, the fact the Fox contract was not renewed, without more, did not mean that D & L Events was unable to perform its obligations under the promotion contract - D & L Events had repudiated the contract after the loss of the Fox contract, however, by insisting that Opetaia fight in matches promoted by a third party promoter, whose financial interests may lie in furthering the career of Opetaia's opponent - the promotion contract, on its proper construction, did not permit D & L Events to insist on this - Opetaia had been entitled to accept this repudiation by D & L Events and terminate the contract - application dismissed.
D & L Events Pty Ltd
[From Benchmark Tuesday, 15 October 2024]

Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122
Court of Appeal of Western Australia
Quinlan CJ, Buss P, & Lundberg J
Contracts - the respondent entered into a written contract to hire a loader from the appellant for

four years for use at its fertiliser plant - it was an express term of the contract that the appellant would turn of the master key every night, which would isolate the battery - an employee of the appellant failed to turn off the master key, as a result of which the loader caught fire and the premises were destroyed - the respondent sued the appellant in contract and negligence - the primary judge found the appellant had breached the contract, and that this breach had caused the fire and the destruction of the loader - the primary judge also found that the appellant had owned a duty of care, had breached that duty of care, and that this breach caused the fire and the destruction of the loader - the appellant appealed - held: an appellant is bound by the conduct of its case at trial - remoteness of contractual damages was not in issue at the trial and was not litigated between the parties - although remoteness of damage is related to causation, they are separate and distinct concepts - although a plaintiff bears the legal burden of proving loss or damage arising from a breach of contract, including that the loss or damage caused by the breach of contract was not too remote, the plaintiff will not be obliged to discharge the legal burden unless remoteness is put in issue by the defendant, either in its defence or by the manner in which the defendant conducts its case at the trial - the appellant should not now be permitted to make a case regarding remoteness of damage - the primary judge had not erred in concluding that the appellant's failure to turn the master key off was a cause of the fire - even if the purpose of the installation of the master key was not to prevent fires, but merely to prevent battery drainage, turning the master key off was connected to the risk of a fire occurring - the application of the 'but for' test, in the circumstances of the present case did not produce an unacceptable result - the primary judge did not err in finding that the appellant breached its duty of care to the respondent by failing to turn the master key off - it was foreseeable that, if the appellant failed to store the loader with the master key in the 'off' position when the loader was parked each night, there was a risk of an electrical fault occurring, igniting a fire, and damaging the loader - appeal dismissed.

Summit Rural (WA) Pty Limited

[From Benchmark Tuesday, 15 October 2024]

Executive Summary and (One Minute Read)

Aquino v Bondfield Construction Co (SCC) - The fraudulent intent of a senior employee, found to be the directing mind of companies, can be attributed to the companies in a bankruptcy proceeding

Summaries With Link (Five Minute Read)

Aquino v Bondfield Construction Co 2024 SCC 31
Supreme Court of Canada
Wagner CJ, Karakatsanis, Côté, Rowe, Martin, Jamal, & O'Bonsawin JJ
The President of two family-owned construction companies had for years fraudulently taken tens of millions of dollars from the companies through a false invoicing scheme. In subsequent bankruptcy proceedings against the companies, the payments made under the invoicing scheme were challenged under the *Bankruptcy and Insolvency Act*. Under the Act, money paid by the debtor can be recovered if the transfers were made at undervalue with the intent to defraud creditors. The lower court concluded that these were payments made at undervalue with fraudulent intent. The bankrupt entities contended that the payments were made to creditors and that fraudulent intent was not present. The Court held that the executive's fraudulent intent could be attributed to the bankrupt companies and that the money should be paid back. The Supreme Court (Jamal J, joined by Wagner CJ, Karakatsanis, Côté, Rowe, Martin, O'Bonsawin JJ) dismissed the appeal and held that the courts could find that a debtor intended to defraud creditors even if the debtor was not insolvent at the time of the undervalue transfers. Specifically, the executive's fraudulent intent should be attributed to the debtor companies because he was their directing mind. The Supreme Court stated that the test for corporate attribution is simply whether the executive was the directing mind of the business and whether the actions were performed within the corporate responsibility assigned to him. If so, the fraudulent intent of the executive could be attributed to the corporation.
Aquino

Poem for Friday

In My Craft or Sullen Art

By Dylan Thomas (1914-1953)

In my craft or sullen art
Exercised in the still night
When only the moon rages
And the lovers lie abed
With all their griefs in their arms,
I labour by singing light
Not for ambition or bread
Or the strut and trade of charms
On the ivory stages
But for the common wages
Of their most secret heart.
Not for the proud man apart
From the raging moon I write
On these spindrift pages
Nor for the towering dead
With their nightingales and psalms
But for the lovers, their arms
Round the griefs of the ages,
Who pay no praise or wages
Nor heed my craft or art.

Dylan Marlais Thomas, poet, writer and broadcaster, was born on 27 October 1914 in Swansea, Glamorgan, Wales. His well-known works include Under Milk Wood, “a play for voices”, Do not go gentle into that good night, and, And death shall have no dominion. He loved Wales but was not a Welsh nationalist. His father wrote that he was “*afraid Dylan isn’t much of a Welshman”.* Robert Lowell, wrote of criticism of Thomas’ greatness as a poet, "Nothing could be more wrongheaded than the English disputes about Dylan Thomas's greatness...He is a dazzling obscure writer who can be enjoyed without understanding." The Welsh Academy Encyclopedia of Wales described him, and particularly his life in New York City before his death as a "roistering, drunken and doomed poet."

Dylan Thomas reads “In My Craft or Sullen Art”
https://www.youtube.com/watch?v=Tiw3uOT2eUc

Read by **Colin McPhillamy**, actor and playwright. Colin was born in London to Australian

parents. He trained at the Royal Central School of Speech and Drama in London. In the UK he worked in the West End, at the Royal National Theatre for five seasons, and extensively in British regional theatre. In the USA he has appeared on Broadway, Off-Broadway and at regional centres across the country. Colin has acted in Australia, China, New Zealand, and across Europe. Colin is married to Alan Conolly's cousin Patricia Conolly, the renowned actor and stage actress: https://en.wikipedia.org/wiki/Patricia_Conolly and https://trove.nla.gov.au/newspaper/article/47250992.

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