AR CONOLLY & COMPANY
LAWYERS

Benchmark

Friday, 11 October 2024

Weekly Civil Law Review

Selected from our Daily Bulletins covering Insurance, Banking, Construction & Government

Search Engine

Click here to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

Executive Summary (One Minute Read)

HBSY Pty Ltd v Lewis (HCA) - s7(5) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) requires all appeals from State Supreme Courts involving matters arising under certain Commonwealth legislation be heard by the relevant federal court, irrespective of the State Supreme Court's source of jurisdiction (B I)

David William Pallas & Julie Ann Pallas as trustees for the Pallas Family Superannuation Fund v Lendlease Corporation Ltd (NSWCA) - NSW Court of Appeal followed its own previous authority, rather than recent Full Federal Court authority, regarding the power of the Court to make class closure orders (I B C)

Kennedy Civil Contracting Pty Ltd (subject to deed of company arrangement) v Linx Constructions Pty Ltd (NSWCA) - leave to appeal refused as the case was not a suitable vehicle for determining the scope of the prohibition against raising a cross-claim under s15(4) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (I B C)

Clinch v Brown (NSWSC) - transfer of property by husband to wife in 1976 not registered - wife's executor unable to discharge onus that there was an agreement between the spouses giving the wife the whole of the equitable estate in the property (I B C)

Fredon Infrastructure Pty Ltd v Hitachi Rail GTS Australia Pty Ltd (NSWSC) - payment claims under the *Building and Construction Industry Security of Payment Act 1999* (NSW) had been validly served by email to officers who had actual and apparent authority to receive them (B C I)

AR Conolly & Company Lawyers
Level 29 Chifley Tower, 2 Chifley Square, Sydney NSW 2000
Phone: 02 9159 0777 Fax: 02 9159 0778
www.arconolly.com.au

Murphy Mcarthy & Associates Pty Limited (Administrator Appointed) v Zurich Australia Limited (NSWSC) - insured under life insurance policy who worked in the construction industry was still able to work in his own occupation within the meaning of his life insurance policy (I B C)

Irwin v Victorian WorkCover Authority & Anor (VSC) - application for judicial review of a medical panel's assessment that found 0% WPI for hearing loss dismissed (I)

Platform Constructions Pty Ltd v Fourth Dimension AU Pty Ltd ATF BD Hope Unit Trust & Ors (QSC) - s79(6) of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) enlarges the ambit of what constitutes a copy of an adjudication application, rather than the ambit of a claimant's obligation to provide a copy of the adjudication application to the respondent (I B C)

Abood v State of Queensland (QSC) - pleadings struck out where a claim was made that police negligently issued a Police Protection Notice on the basis of no evidence (I B)

HABEAS CANEM

Before the puppy ears finally dropped

AR Conolly & Company Lawyers
Level 29 Chifley Tower, 2 Chifley Square, Sydney NSW 2000
Phone: 02 9159 0777 Fax: 02 9159 0778
www.arconolly.com.au

Summaries With Link (Five Minute Read)

HBSY Pty Ltd v Lewis [2024] HCA 35
High Court of Australia
Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot, & Beech-Jones JJ
Jurisdiction - an executor and beneficiary named in a will caused loss to the estate in breach of fiduciary duty - an administrator was later appointed - the former executor became bankrupt, and his interest in the estate was sold to HSBY - HSBY commenced proceedings in the NSW Supreme Court seeking to revoke the letters of administration - the administrator cross-claimed, contending that HSBY was not entitled to any distribution until the loss was made good - HSBY said the former executor's liability to the estate had been extinguished under the *Bankruptcy Act 1966* (Cth) - the Supreme Court found in favour of the administrator - HSBY considered an appeal would concern a matter arising under the *Bankruptcy Act*, and so an appeal only lay to the Full Court of the Federal Court pursuant to s7(5) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) - HSBY sought an extension of time to appeal to the Full Court, which held it did not have jurisdiction to hear the appeal - HBSY sought writs of certiorari and mandamus from the High Court requiring the Full Court to hear the appeal - held (by majority, Gageler CJ dissenting): s24(1)(c) of the *Federal Court of Australia Act 1976* (Cth) gives the Federal Court jurisdiction to hear appeals from State Supreme Court judgments where this is provided by any other Act - s7(5) of the *Jurisdiction of Courts (Cross-vesting) Act* provides that, if it appears that an appeal from a single judge of a State Supreme Court would involve a matter arising under certain Commonwealth legislation (including the *Bankruptcy Act*), that appeal can only be heard by the Federal Court, the Federal Circuit and Family Court of Australia (Division 1), or, by special leave, the High Court - the Federal Court had erred by reading down s7(5) so that it applies only to cases where the single judge of a State Supreme Court was exercising cross-vested federal jurisdiction under s4(1) of the *Jurisdiction of Courts (Cross-vesting) Act* - s7(5) applies irrespective of the source of the Supreme Court's jurisdiction - writs of certiorari and mandamus issued requiring the Federal Court to hear and determine the appeal.
HBSY Pty Ltd (B I)
[From Benchmark Thursday, 10 October 2024]

David William Pallas & Julie Ann Pallas as trustees for the Pallas Family Superannuation Fund v Lendlease Corporation Ltd [2024] NSWCA 83
Court of Appeal of New South Wales
Bell CJ, Ward P, Gleeson, Leeming, & Stern JJA
Class actions - the representative plaintiffs, and other members of the class, were stapled securityholders of shares in Lendlease Corporation Ltd, an ASX-listed property and infrastructure company, which were stapled to units in the Lendlease Trust - the plaintiffs contended that Lendlease breached its continuous disclosure obligations and engaged in misleading or deceptive conduct - Lendlease wished the notice to group members to include a class closure notation that group members who did not register with the plaintiffs' law form, or opt out in accordance with Court orders, would remain group members but would not receive

any benefit from any settlement without leave of the Court - NSW Court of Appeal authority held that the Court did not have power to do this - the Full Court of the Federal Court had recently held that this NSW authority was plainly wrong and should not be followed - the trial judge referred a question to the Court of Appeal whether the Court had power to approve a notice containing the proposed notation - held: while intermediate appellate courts are not legally bound by their own earlier decisions, they should only depart from such authority or the authority of courts of co-ordinate jurisdiction within the national system if they are of the view that the decision in question is "plainly wrong", and, such an error having been identified, there are "compelling reasons" to depart from the earlier decision - one matter left unresolved on the authorities is what a Court should do where neither of two competing interpretations could be said to be plainly wrong - where one of those decisions is that of the same Court which has previously expressed a view on the matter, that Court should adhere to its previously expressed view - the Court differed from the recent Full Federal Court, and did not consider that its previous authority was plainly wrong - the proposed notation would put the plaintiffs in a position of conflict of interest at mediation, as it would be in the interests of registered group members to achieve a settlement, and in the interests of unregistered group members to oppose any settlement - question answered "no".
View Decision (I B C)
[From Benchmark Wednesday, 9 October 2024]

Kennedy Civil Contracting Pty Ltd (subject to deed of company arrangement) v Linx Constructions Pty Ltd [2024] NSWCA 243
Court of Appeal of New South Wales
Bell CJ, Basten, & Griffiths AJJA
Security of payments - Linx engaged Kennedy to perform construction works - Kennedy served a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) - Linx did not serve a payment schedule - Kennedy commenced proceedings in the Local Court to recover the amount - the Magistrate reduced the claimed amount by the amount of a payment Linx had made to a third party supplier, which amount the third party had previously invoiced to Kennedy, but then invoiced to Linx on Kennedy going into external administration - s14(4) of the Act provides that, where the respondent does not serve a payment claim, it becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates - s15(4) provides that, where the claimant sued in a court of competent jurisdiction to recover the unpaid amount of the debt, the respondent is not entitled to bring any cross-claim against the claimant or raise any defence in relation to matters arising under the construction contract - the Magistrate found that Linx relying third party payment was not a form of cross-claim, but merely involved identifying the portion of the claim that remained unpaid - a Judge of the Supreme Court dismissed Kennedy's appeal - Kennedy sought leave to appeal to the Court of Appeal (leave was required because the amount in issue was less than $100.000) - held: the monetary sum at stake was approximately $30,000, which highlighted the heavy onus carried by Kennedy in demonstrating that its application satisfied the criteria for a grant of leave - the application did not raise an issue of

principle or question of public importance regarding whether Linx's set-off was in substance a cross-claim which was caught by the prohibition in s15(4) - the proceeding involved somewhat unusual facts and circumstances, including the way in which the case was conducted - the case did not present a suitable vehicle for determining the scope of the prohibition in s15(4) - the primary judgment also did not produce a reasonably clear injustice which goes beyond something which is merely arguable - leave to appeal refused.
View Decision (I B C)
[From Benchmark Friday, 11 October 2024]

Clinch v Brown [2024] NSWSC 1239
Supreme Court of New South Wales
Kunc J
Transfer of land - in 1976, a married couple executed a transfer (duly stamped and in registrable form) of property from the husband to the wife, which recorded consideration of $14,500 - the transfer was never registered, but continued to be held by the couple's solicitor - in 2018, the wife died, and her will left the property to her daughter subject to life estate to the husband - the daughter commenced proceedings seeking an order that the executors lodge the transfer for registration and then transfer the property to her as beneficiary - the husband died while the proceedings was on foot, and, if the orders sought by the daughter were not made, the property would form part of his estate - held: as the executors had declined to bring the proceedings, the daughter could do so as a beneficiary of the wife's estate - from 1976 to his death, the husband had been the registered proprietor of the property and so was prima facie entitled to the full legal and beneficial interest in the property - the wife might have had an equitable interest, but such equitable interests can only be established if there is evidence of an antecedent agreement which founds the equitable interest - no agreement was in evidence - neither spouse was available to give evidence and neither party called the solicitor - the daughter bore the onus of proof to establish the terms of any agreement that would give rise to an equitable interest - no *Jones v Dunkel* inference should be drawn against either side as a result of the failure to call the solicitor - the Court found that, up to 1981, there was a consensual arrangement in place between the married couple that the transaction between them should not be completed - the daughter had been unable to satisfy the Court that the arrangement not to complete the transaction changed before the wife's death - the Court could not be satisfied that the wife had the whole of the equitable estate in the property at the date of her death - daughter's claim dismissed.
View Decision (I B C)
[From Benchmark Wednesday, 9 October 2024]

Fredon Infrastructure Pty Ltd v Hitachi Rail GTS Australia Pty Ltd [2024] NSWSC 1244
Supreme Court of New South Wales
Stevenson J
Agency - Fredon and Hitachi were parties to two construction contracts in the same terms for carrying out of work by Fredon in respect of the Victoria Cross and Crows Nest Metro Station -

Fredon sent to officers of Hitachi two payment claims under the *Building and Construction Industry Security of Payment Act 1999* (NSW) - Hitachi said the payment claims were not validly served, as the contracts req required Fredon to serve the payment claims on a particular nominated representative, and, if they were validly served, they were served the following day (which would mean that Hitachi's payment schedule was served within time) - held: under the terms of her contract of employment, the Hitachi officer who was one of the recipients of the payment claims had actual authority to receive payment claims generally, and did, with that actual authority, receive on behalf of Hitachi the payment claims in question - as to apparent authority, if a principal represents to a contractor that the principal's agent has authority to receive a document, and the contractor serves a document on that agent in reliance on that representation, the agent will be taken to have apparent authority to receive the document - Hitachi's predecessor had made such a representation regarding the officers who received the payment claims - delivery to these officers had been delivery to Hitachi - the correct inference on the evidence was that both of these officers had received the payment claims by email while they were at work - the payment claims had been effectively served on the day Fredon sent them, and Hitachi's payment schedule was served out of time - Hitachi was therefore liable to Fredon for the amount of the payment claims.
View Decision (B C I)
[From Benchmark Wednesday, 9 October 2024]

Murphy Mcarthy & Associates Pty Limited (Administrator Appointed) v Zurich Australia Limited [2024] NSWSC 1203
Supreme Court of New South Wales
Kunc J
Life insurance - Heron worked in the construction industry - he underwent total left hip replacement surgery - the surgery was successful and he returned to work, and was able to do almost all of the activities his work required - the company to which Heron provided his services claimed under Heron's life insurance policy on the basis of 'Own Occupation Total and Permanent Disability' - held: the proper construction of "occupation" in the definition of "Own Occupation" was that employment, trade. or business in which the insured is habitually engaged and by which the insured earns a livelihood or receives some form of remuneration - to determine Herron's "Own Occupation" it was necessary to consider what specific tasks and duties he was in fact performing for MMA immediately before the date of disablement, but it was also necessary to take into account matters such as his qualifications, experience, and job description or title to arrive at what would necessarily be a more generic descriptor - on the evidence, Heron's "most recent occupation" was Construction Manager/Project Supervisor - the post-surgical condition Heron suffered was that his hip did not permit him to undertake safely certain activities in a trench which include walking along a concrete pipe in a trench and undertaking work in a confined space in a trench that might put his hip into an "awkward" position - this disability was not such that Heron was unlikely ever again to work in his 'Own Occupation' - not every job Heron supervised and managed for the company required him to do the sort of activity in trenches that he could not now safely perform - the ability to undertake

these trench activities was no essential for him to be able to engage in his 'Own Occupation' - proceedings dismissed.
View Decision (I B C)
[From Benchmark Thursday, 10 October 2024]

Irwin v Victorian WorkCover Authority & Anor [2024] VSC 615
Supreme Court of Victoria
O'Meara J
Workers compensation - the plaintiff was employed as a labourer for about 33 years, during which time he was exposed to noise - his hearing was assessed by an audiologist, who found a whole person impairment of 11%, taking into account a 3.8% correction for age related hearing loss and a loading of % for tinnitus - the plaintiff claimed an impairment benefit - the first defendant's agent referred the plaintiff to an otorhinolaryngologist, who found noise induced hearing loss of 8.7%, which equated to 0% WPI, and made no additional allowance for tinnitus beyond its effect on the plaintiff's hearing loss - the agent notified the plaintiff that liability was accepted for diminution of hearing, but rejected for tinnitus, and there was no entitlement to an impairment benefit because the degree of permanent impairment had not been assessed as 10% or greater - medical questions were referred to a medical panel which found WPI of 0% and that the plaintiff did not have an accepted injury which had resulted in a total loss injury - the plaintiff sought judicial review - held: a medical panel is neither arbitral nor adjudicative, and its function in every case is to form its own opinion on the medical question referred to it by applying its own medical experience and expertise - the testing of hearing impairment, as contemplated by the American Medical Association Guides to the Evaluation of Permanent Impairment, specifically contemplates the use of amplification - a sentence that appears in respect of the stated criterion 'permanent hearing impairment' in the AMA Guides, that prosthetic devices must not be used during the evaluation of hearing sensitivity, did not refer to amplification - although this would mean that the plaintiff would receive no impairment benefit for the employment related diminution in his hearing, this was a consequence of a scheme in which such a benefit may only be assessed in respect of whole person impairment of 10% or more, it was not said that the medical panel's assessment of the plaintiff's hearing was erroneous, the medical panel had made no error in determining that there was an impairment percentage of 0% for the effect of tinnitus, and the plaintiff had told the medical panel that he was no longer troubled by tinnitus - proceedings dismissed.
Irwin (I)
[From Benchmark Friday, 11 October 2024]

Platform Constructions Pty Ltd v Fourth Dimension AU Pty Ltd ATF BD Hope Unit Trust & Ors [2024] QSC 235
Supreme Court of Queensland
Copley J
Security of payment - the applicant and the first respondent entered into a written contract in relation to a building project at Southport, under which the first respondent agreed to supply and

install vinyl planks - an adjudicator under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) made two adjudication decisions finding adjudicated amounts of nil and about $135,000 respectively - the plaintiff sought judicial review - held: the first adjudicator's registration as an adjudicator had lapsed two days before he made the adjudication decision - this adjudication decision was void because the adjudicator had not been a registered adjudicator at the date of the decision - as for the second adjudication, in requiring that a copy of an adjudication application be given to a respondent, s79(4)(a), if considered on its own, might require a respondent be given a duplicate or an exact likeness of the adjudication application made - however, s79(6) defines 'copy' of an adjudication application as including a document containing details of the application given to the claimant by the registrar after application - the applicant's submission that this meant that a claimant for adjudication has to serve both the full application and the document provided by the registrar after application should be rejected - on its proper construction, s79(6) enlarges the ambit of what constitutes a copy of an adjudication application - the applicant had failed to show that the first respondent failed to comply with its obligation to provide a copy of the adjudication application as required by s79(4) - judicial review application in respect of the second adjudication dismissed.
Platform Constructions Pty Ltd (I B C)
[From Benchmark Wednesday, 9 October 2024]

Abood v State of Queensland [2024] QSC 225
Supreme Court of Queensland
Freeburn J
Negligence - Abood alleged that his former partner, who still lived in the same house, made false domestic violence allegations, and that police attended the property and detained him, but found no substantial or sufficient evidence of the allegations, and then issued a Police Protection Notice with no-contact conditions for both the partner and their infant daughter - Abood became suspicious that the former partner was preparing to leave Australia with their daughter - he made five urgent airport watchlist applications - the first four applications were rejected, and, by the time of the fifth, the former partner had already left for Brazil with the daughter - Abood sued the State of Queensland and the Commonwealth in negligence - the defendants applied to strike out the pleadings on the basis that they disclosed no cause of action - held: police officers have a statutory duty owed to the public in general to uphold the law, but this not ordinarily give rise to a duty owed to an individual or to the members of a particular class - an evaluation of whether a relationship between a statutory authority and a class of persons imports a common law duty of care is necessarily a multi-faceted inquiry - the duty of care that Abood argued for would likely conflict with any duty that the police officers may have owed to the former partner or the daughter - Abood had not pleaded any facts that the ex-partner's conduct in removing the daughter from Australia was contrary to law - even assuming Abood was right that the ex-partner's complaint of domestic violence was false, and that he was being subjected to controlling or abusive behaviour by her, that does not establish that the police officers owed him a duty of care - further, it would not be a breach of any such duty merely for the police officers to arrive a wrong conclusion - regarding, the claim against the

Commonwealth, the AFP's conduct was constrained by law - the AFP had not power to place the ex-partner or daughter's names on a watchlist unless Abood commenced proceeding for a parenting order, which he did not do until shortly before making the fifth application, by which time the ex-partner and daughter had already left Australia - Abood made a distinct claim for 'malice and ill will', but there is no such cause of action - even if police officers breach their statutory duties, this does not give private citizens a cause of action - the Court noted that the constellation of events had led to a quite sad and unfair outcome for Mr Abood, but, unfortunately, not every unfair outcome means that the claimant has a viable cause of action and a legal remedy - pleading struck out.

Abood (I B)

[From Benchmark Friday, 11 October 2024]

Executive Summary and (One Minute Read)

Paki Nikora v Tamati Kruger (NZSC) - The Maori Land Court had jurisdiction to review the election of trustees to the Tuhoe - Te Uru Tamatua Trust inasmuch as the Trust, among other functions, held land as a post-settlement governance entity

Summaries With Link (Five Minute Read)

Paki Nikora v Tamati Kruger [2024] NZSC 130
Supreme Court of New Zealand
Winkelmann, CJ, Glazebrook, Williams, O'Regan, & Collins JJ
Paki Nikora contended that two of the trustees of the Tuhoe - Te Uru Taumatua Trust (TUT) had not been selected in accordance with the terms of the trust. Nikora commenced proceedings in the Maori Land Court and the Court ordered fresh elections. TUT refused to acknowledge the jurisdiction of the Land Court and declined to participate in the proceedings. The matter was appealed to the Maori Appellate Court that upheld the decision of the Land Court. However on subsequent review by the Court of Appeal, the decisions of the Maori Land Court and Appellate Court were overturned. The Court of Appeal found that, inasmuch as TUT had authority over a wide range of matters and was not constituted in respect of land and its primary purpose did not relate to land, the Maori Land Court lacked jurisdiction with respect to trust activities. On further review, the Supreme Court determined that the Court of Appeal was in error and concluded that the Maori Land Court had jurisdiction to hear the matter because, from its outset, TUT was established to hold parcels of land regardless of its holdings at the time of its inception. The Court also noted that the Maori Land Court by long experience was sensitive to the challenges of communal asset management and that Maori Land Court judges had special knowledge and expertise and had proceeded with due care to resolve the issues despite the lack of participation by one of the parties.
Paki Nikora

Poem for Friday

Risk

By Anaïs Nin (1903-1977)

And then the day came,
when the risk
to remain tight
in a bud
was more painful
than the risk
it took
to blossom.

Anaïs Nin, (Angela Anaïs Juana Antolina Rosa Edelmira Nin y Culmell), was born in 1903, outside Paris, of Cuban parents. Her father was the composer, Joaquin Nin. Nin was a French Cuban American who wrote essays, novels and short stories. *The Diary of Anais Nin* was written initially as a letter to her father, who had left the family some years before Anaïs Nin wrote, starting at the age of 11 in 1914. The diary of Anaïs Nin was published over 7 volumes, in expurgated and unexpurgated volumes. She was a close friend of Henry Miller. She died in Los Angeles, USA, of cancer.

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.

Click Here to access our Benchmark Search Engine