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LAWYERS

Benchmark

Friday, 26 April 2024

Weekly Civil Law Review

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

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Executive Summary (One Minute Read)

Clubb (administrator), in the matter of Town Tavern Blacktown Pty Limited (administrators appointed) (receivers and managers appointed) (FCA) - the Court extended the date of the convening period for the second meeting of creditors for a group of companies in administration (I B)

Fitzgerald, in the matter of Tempo Holidays Pty Ltd (in liq) v Tully (FCA) - insurer not liable for settlement of breach of director's duties claim, as it had not been shown it was reasonable, or that the case against the director would have succeeded (B C I)

Greiss v Seven Network (Operations) Limited (Costs) (FCA) - Seven ordered to pay partially successful costs, calculated on the basis as if the proceedings had been commenced in the District Court of NSW (I)

David William Pallas & Julie Ann Pallas as trustees for the Pallas Family Superannuation Fund v Lendlease Corporation Ltd (NSWCA) - Court of Appeal declined to depart from previous authority that held that the Supreme Court does not have power to make so-called class closure orders in representative proceedings (I B)

The Owners - Strata Plan No 64757 v Sydney Remedial Builders Pty Ltd (NSWCA) - leave to appeal refused from the decision of the primary judge to reject the report of a referee in a building and construction case (B C I)

Yang v New South Wales Land and Housing Corporation (NSWSC) - plaintiff had not been under a disability while incarcerated in China or while suffering from a depressive disorder, and

his claim was therefore statute barred (I B)

HABEAS CANEM

Country smile

Summaries With Link (Five Minute Read)

Clubb (administrator), in the matter of Town Tavern Blacktown Pty Limited (administrators appointed) (receivers and managers appointed) [2024] FCA 405
Federal Court of Australia
Halley J
Corporations - a company and five related entities comprised a corporate group that carried on a licensed hotel business in Western Sydney known as the Phoenix Town Tavern Blacktown - the Company leased premises in Blacktown and held assets necessary to conduct the business, including poker machines, gaming machine entitlements and licenses, financed motor vehicles, and bar equipment - Robin Hood Blacktown operated as a management services entity for the company - the assets of the companies comprising the group ere intertwined, and the Company leased the premises but Robin Hood Blacktown conducted its operations - the company had a liquor licence, poker machine permit, and was the lessee pursuant to equipment lease agreements - members of the group (including the Company) entered into various agreements, including a subscription agreement and a further subscription agreement with Nomura Special Investments Singapore Pte Limited, to raise funds - in due course, Nomura issued notices of default and a demand for unpaid amounts - a security trustee appointed receivers and managers of all the assets and undertakings of the company and Robin Hood Blacktown, and then to all members of the group - the administrators sought, pursuant to s439A(6) of the *Corporations Act 2001* (Cth), that the date of the convening period as defined by s439A(5) of that Act, for the second meeting of creditors of required under s439A of the Act (Second Meeting) be extended - held: the object of Part 5.3A of the *Corporations Act* is to maximise the chance of a company continuing in existence, or, if that is not possible, obtain a better return for the company's creditors and members than would result from an immediate winding up - in exercising the jurisdiction to extend the convening period: (a) the Court is required to balance the interests of creditors in a timely administration; and (b) the need to allow sufficient time to administrators to carry out their functions properly and maximise the benefits to creditors through a proper administration - the extension sought would enable an orderly and comprehensive sales campaign to be undertaken consistently with the sale program developed by the receivers - it would also preserve the ability of the administrators to structure the sale of the group, including by way of a deed of company arrangement, which could not be utilised without the company remaining in administration - it would also enable the administrators to take advantage of the regime provided by Part 5.3A, in particular the moratorium on the enforcement of debts, the avoidance of liabilities that crystallise upon the company entering into liquidation, thereby allowing the administrators to retain its assets necessary to conduct the business - extension made as sought by the administrators.
Clubb (I B)
[From Benchmark Tuesday, 23 April 2024]

Fitzgerald, in the matter of Tempo Holidays Pty Ltd (in liq) v Tully [2024] FCA 391
Federal Court of Australia

McElwaine J
Insolvency - Tempo's liquidator brought claims against Tully, a former director, for (1) breach of statutory and fiduciary duties by failing to monitor the inter-group transfer of funds pursuant to an informal debtor/creditor arrangement, under which debts were unsecured and became unrecoverable; and (2) insolvent trading under s588M of the *Corporations Act 2001* (Cth) - the insurer under a Management Liability Insurance Policy declined to indemnify Tully for breach of the director's duty claim (it was not in issue that it had no liability to indemnify Tully for the insolvent trading claim) - the proceedings settled with Tully consenting to judgment for about $6million on the director's duty claim and about $24million on the insolvent trading claim, with the liquidator agreeing to enforce the judgment first against the insurer, and after that only against a security sum of $500,000 provided by Tully - the liquidator sought to recover from the insurer - held: indemnity was provided on a claims made and notified basis - courts "allow some leeway" in requiring correlation between an original demand and the way in which a claim is ultimately pleaded - the demand that the liquidator had originally sent Tully for payment of about $5million for breach of director's duties and/or insolvent trading was not of a different legal and factual character than the claim now sought to be made against the insurer - for a claim to be made within the meaning of the policy, no more was required than a written demand against an insured person for compensation or damages - what amounts to a claim is a question of fact, and there is no magic formula - although Tully's liability under the settlement was capped at $500,000, the insurer appropriately did not contend that its liability was also so limited - the liquidator's evidence as to the reasonableness of the settlement was insufficient - the settlement was therefore not a basis to claim against the insurer - whether one concentrated on the content of Tully's duties as pleaded or on the more expansive framing of the claim in the liquidator's closing submissions, the evidence was insufficient to make good either of breach of duty cases pursuant to s180 or s181 of the *Corporations Act* - the liquidator also failed to prove that any contravention by Tully resulted in damage being suffered by Tempo - further, Tempo had been aware of four matters that a reasonable person in the circumstances could be expected to know were relevant to the insurer's decision to accept the risk and on what terms - therefore, Tempo had breached its duty of disclosure under s21 of the *Insurance Contracts Act 1984* (Cth) - proceedings dismissed.
https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2024/2024fca0391 (B C I)
[From Benchmark Wednesday, 24 April 2024]

Greiss v Seven Network (Operations) Limited (Costs) [2024] FCA 377
Federal Court of Australia
Katzmann J
Costs in defamation cases - Greiss attended a sentencing hearing in support of the rugby league player, Jarryd Haynes, who had been convicted of sexual assault - Seven had published an article on the 7News website and a Facebook post on the 7News Facebook account - a Seven journalist had published a tweet on her personal Twitter account - the Court had held that the defence of contextual truth succeeded in respect the news report and the tweet, and a

defence of honest opinion succeeded regarding the tweet, but that Greiss succeeded with respect to the Facebook post, and the libel involved in this post was serious, and $35,000 was appropriate to compensate him for his non-economic loss but that there should be no aggravated damages (see Weekly Defamation Benchmark 23 February 2024) - the Court now considered costs - held: s43 of the *Federal Court of Australia Act 1976* (Cth) confers a broad discretion on the Court with respect to costs, relevantly limited only by the need to act judicially and by the obligations imposed by Part VB of the Act, including the obligation imposed by s37M(3) to exercise any power conferred by the civil practice and procedure provisions of the Act and the Rules in the way that best promotes their overarching purpose - further, s40(1) of the *Defamation Act 2005* (NSW) entitles the Court to take into account the way in which the parties conducted their cases and any other matters the Court considers relevant in awarding costs - where there has been mixed success, three aspects generally assume significance (1) whether one party has enjoyed real practical success; (2) the Court is reluctant to assess costs on an issue by issue basis because the Court has an eye to the interests of justice in bringing finality to the dispute and the diminishing returns involved in expending further time and costs in identifying the extent to which costs related to particular aspects of the conduct of the proceedings; and (3) a preference for adjustments by way of percentage reductions made on a broad brush approach taking account of the degree of success and the likely extent of costs associated with that aspect of the case - the journalist should not be required to pay Greiss's costs, as she was only a respondent in relation to the tweet and she had been wholly successful - it was incorrect to say that the respondents only succeeded because of the contextual truth defence, as the facts upon which it was based were also relevant to mitigation of damages - the award of damages had been modest, but not nominal - Greis had not brought the proceedings on a knowingly false basis - there is no particular reason why the proceedings should have been filed in the Federal Court, rather than in the Federal Circuit and Family Court (Division 1) or the District Court of NSW - the most appropriate order was that Seven pay Greiss's costs on a party and party basis, to be calculated as if the proceeding had been commenced in the District Court.
Greiss (I)
[From Benchmark Friday, 26 April 2024]

David William Pallas & Julie Ann Pallas as trustees for the Pallas Family Superannuation Fund v Lendlease Corporation Ltd [2024] NSWCA 83
Bell CJ, Ward P, Gleeson, Leeming, & Stern JJA
Court of Appeal of New South Wales
Representative proceedings - plaintiffs 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 - they alleged that Lendlease breached its continuous disclosure obligations and engaged in misleading or deceptive conduct during a certain period during which approximately 445 million shares were traded - they complained about pre-tax provisions which they alleged Lendlease should have taken, and certain reductions in after-tax profits they alleged Lendlease should have made, with respect to three projects which it was undertaking -

they commenced representative proceedings on behalf of all such shareholders - the trial judge stated a separate question to the Court of Appeal, namely that, notwithstanding previous authority, does the Supreme Court have power pursuant to sections 175(1), 175(5) and 176(1) of the *Civil Procedure Act 2005* (NSW) or otherwise to approve a notice to group members of the right to participate in any settlement of the proceedings or opt out of the proceedings, containing a particular notation - the previous authority referred to would compel a negative answer to this question - 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 - the previous authority was no plainly wrong, although it may be accepted that the question is one upon which opinions might differ - there were also no compelling reasons to depart from that previous authority - the notice sought to be given sought what is commonly known as a "class closure order", that is, an order by which the class or group in a representative proceeding is wholly or partially restricted, and the rights of certain group members (generally, those who are unregistered) are extinguished irrespective of the fact that they do not participate in the fruits of any settlement - such an order would create an insoluble conflict of interest on the part of Lendlease in any mediation or settlement discussion - separate question answered in the negative.
View Decision (I B)
[From Benchmark Monday, 22 April 2024]

The Owners - Strata Plan 64757 v Sydney Remedial Builders Pty Ltd [2024] NSWCA 85
Court of Appeal of New South Wales
Leeming & Payne JJA
Home building - the defendant builder was retained to remedy building defects caused by the original builder - the applicant owners corporation commenced proceedings under s48MA of the *Home Building Act 1989* (NSW), seeking damages in respect of defective building works - the parties reached agreement on quantum - the only issue was whether the proceedings were commenced within time - this issue was referred to a referee for separate determination - the referee concluded that the date of practical completion of the works was 16 March 2012, and that the proceedings were therefore commenced within the time required by s18E of the *Home Building Act*, that is, before 16 March 2019 - the applicant contended that the Court should accept the referee's report under r20.24(a) of the *Uniform Civil Procedure Rules 2005* (NSW) - the defendant contended the Court should reject the referee's report - the primary judge dismissed the proceedings (see Benchmark 20 September 2023) - the applicant sought leave to appeal from the decision of the primary judge to reject the report of the referee - held: one reason for the requirement in UCPR r51.12(4) for the summary of argument filed with in relation to an application for leave to appeal to state the questions involved is to permit the Court to determine whether there should be a concurrent hearing or, as occurred in the present case, a hearing of the application for leave before the Court constituted by two Judges of Appeal - another reason is to permit the merits of the application for leave to be fully and fairly ventilated

at a relatively short hearing for leave - a third reason is to enable the respondent to know the case it is called upon to meet, as well as to determine whether the White Folder filed in relation to the application for leave is to be supplemented - it should not be thought that it will invariably be possible to conduct the hearing as occurred in this case, based on materials supplied the preceding day, and on the basis of submissions advanced for the first time in any detail on the day of hearing - such a course was only adopted in this case as a consequence of the constructive approach adopted by both sides' counsel in their oral address - the primary judge had applied s3B of the *Home Building Act* in accordance with its terms, and had correctly identified that the terms "completion" of the building work and "practical completion" of the building work are deployed separately within the section - it was true that "completion" under s3B was not determined solely by the form of the contract, and, in principle, the parties could choose another word to define something which amounted to "completion" for the purposes of s3B(1), but that theoretical possibility was well removed from the facts of this case and did not assist the applicant - leave to appeal refused.
View Decision (B C I)
[From Benchmark Tuesday, 23 April 2024]

Yang v New South Wales Land and Housing Corporation [2024] NSWSC 428
Supreme Court of New South Wales
Ierace J
Limitation of actions - the plaintiff filed a statement of claim seeking damages from the defendant in tort for breach of a duty of care as the owner of the premises, and voluntary bailment, or conversion, in respect of certain antiques, which he claimed had an "estimated value" at the time of about $1million - the defendant asserted that the plaintiff's causes of action, if any, had accrued by no later than the date of an auction at which he had sold the relevant goods, which was more than six years before the plaintiff commenced the proceedings, and therefore the claim was statute-barred - the defendant sought a determination pursuant to r28.2 of the *Uniform Civil Procedure Rules 2005* (NSW) of whether the plaintiff was under a disability in one or both of two periods of time, within the meaning of s11(3) of the *Limitation Act 1969* (NSW) - the alleged disability during the first period was that the plaintiff had been incarcerated in the People's Republic of China for a period of time - the alleged disability during the second period was that the plaintiff had been suffering from a major depressive disorder - held: the terms of s11(3)(b) of the *Limitation Act* are to the effect that, in order for the disability to qualify as one that suspends the limitation period, it must be the reason that the plaintiff was rendered "incapable of, or substantially impeded in, the management of his ¦ affairs in relation to the cause of action" - the plaintiff had failed to establish that he was "restrained" from contacting an Australian lawyer to commence the cause of action in the sense that term is used at s11(3)(b)(ii), during his period of incarceration - the legal correspondence suggested that, whatever the plaintiff's degree of depressive disorder in the second alleged period of disability, he was not substantially impeded in managing his affairs and taking the necessary steps to commence the action by filing the statement of claim, except for a period of his involuntary admission to St George's Hospital, which was below the threshold of a continuous period of at

least 28 days required by s11(3) - therefore, the plaintiff was statute barred from bringing his action by s 14(1)(b) of the Limitation Act.

View Decision (I B)

[From Benchmark Friday, 26 April 2024]

Executive Summary and (One Minute Read)

Kirkorov v Lithuania (Eur Ct HR) - Decision of Lithuania to deny entry to Russian entertainer on national security grounds did not amount to a violation of Article 10 (freedom of expression) of the *European Convention on Human Rights*

Summaries With Link (Five Minute Read)

Kirkorov v Lithuania, ECHR 096 (2024)
European Court of Human Rights
Bårdsen P, Ilievski, Kuris, Yüksel, Schembri Orland, Krenc, & Derencinovic JJ
Kirkorov was a popular singer from Russia who had been found by the Lithuanian Migration Department to have publicly supported Vladimir Putin and supported Russia's actions in Crimea. The government of Lithuania placed Kirkorov on a list of aliens barred from entering the country. Kirkorov unsuccessfully challenged this decision in the Lithuanian courts. Kirkorov then brought proceedings before the European Court of Human Rights alleging that the actions of Lithuania violated his right to freedom of expression guaranteed by Article 10 of the *European Convention of Human Rights*. Article 10 provides that everyone has the right to freedom of expression without interference by public authority and regardless of frontiers. However, these rights may be subject to such restrictions as are prescribed by law "and are necessary in a democratic society, in the interests of national security' or public safety. The European Court found that, while the right of a foreigner to remain in a country is not a Convention right, 'immigration controls must be exercised consistently with Convention obligations'. The Court ruled that the ban on entry was materially related to the right of expression because, under Article 10, no distinction can be drawn between nationals and foreigners. As entry to Lithuania was denied on the basis of Kirkorov's past statements, the Court found that there had been an interference with his Article 10 rights. The issue came down to whether Lithuania's actions were permissible as being prescribed by law and necessary in the interests of national security. The Court found that Lithuania's actions were prescribed by law that purported to be based on national security. Nevertheless, it was for the courts to determine whether the invocation of national security had a reasonable basis or was contrary to common sense. The Court concluded that there had not been a violation of Article 10 in light of the careful scrutiny by the Lithuanian courts to the claim that Kirkorov represented a threat to national security. Further, the European Court held that the measures taken by Lithuania were not disproportionate and that the national courts had properly weighed the interests of national security against the measures taken against Kirkorov.
Kirkorov

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Poem for Friday

The Song of a Comet

By: Clark Ashton Smith (1893-1961)

A plummet of the changing universe,

Far-cast, I flare

Through gulfs the sun's uncharted orbits bind,

And spaces bare

That intermediate darks immerse

By road of sun nor world confined.

Upon my star-undominated gyre

I mark the systems vanish one by one;

Among the swarming worlds I lunge,

And sudden plunge

Close to the zones of solar fire;

Or 'mid the mighty wrack of stars undone,

Flash, and with momentary rays

Compel the dark to yield

Their aimless forms, whose once far-potent blaze

In ashes chill is now inurned.

A space revealed,

I see their planets turned,

Where holders of the heritage of breath

Exultant rose, and sank to barren death

Beneath the stars' unheeding eyes.

Adown contiguous skies

I pass the thickening brume

Of systems yet unshaped, that hang immense[67]

Along mysterious shores of gloom;

Or see—unimplicated in their doom—

The final and disastrous gyre

Of blinded suns that meet,

And from their mingled heat,

And battle-clouds intense,

O'erspread the deep with fire.

Through stellar labyrinths I thrid

Mine orbit placed amid

The multiple and irised stars, or hid,

Unsolved and intricate,

In many a planet-swinging sun's estate.

Ofttimes I steal in solitary flight

Along the rim of the exterior night

That grips the universe;

And then return,

Past outer footholds of sidereal light,

To where the systems gather and disperse;

And dip again into the web of things,

To watch it shift and burn,

Hearted with stars. On peaceless wings

I pierce, where deep-outstripping all surmise,

The nether heavens drop unsunned,

By stars and planets shunned.

And then I rise

Through vaulting gloom, to watch the dark

Snatch at the flame of failing suns;

Or mark

The heavy-dusked and silent skies,[68]

Strewn thick with wrecked and broken stars,

Where many a fated orbit runs.

An arrow sped from some eternal bow,

Through change of firmaments and systems sent,

And finding bourn nor bars,

I flee, nor know

For what eternal mark my flight is meant.

Clark Ashton Smith was born on 13 January, 1893, in Long Valley, Placer County, California. Largely self-taught, he began writing at a very young age, acquiring an exceptionally large vocabulary by reading the dictionary from cover to cover. A protégé of the San Francisco poet George Sterling, Smith achieved recognition at the age of 19 for his collection of poems The Star Treader (1912), influenced by Baudelaire, Poe and Sterling. Smith always considered himself a poet first and foremost, however, following the Great Depression, he later turned to writing short stories for pulp magazines such as Weird Tales as this was a more lucrative source of income to support himself and his aging parents. He wrote more than 100 short stories between 1929 and 1934, and it is this, along with his friendship with fellow Weird Tales contributor H. P. Lovecraft, for which he is remembered today. Smith lived most of his life in Auburn, California, and passed away in his sleep on 14 August 1961, at the age of 68. In addition to his literary activities, he created a large number of drawings, paintings and sculptures which reflected the otherworldly atmosphere of his tales.

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