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Friday, 3 May 2024

Weekly Corporate Governance

A Weekly Bulletin listing Decisions of Superior Courts of Australia covering Corporate Governance Law

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Executive Summary (One Minute Read)

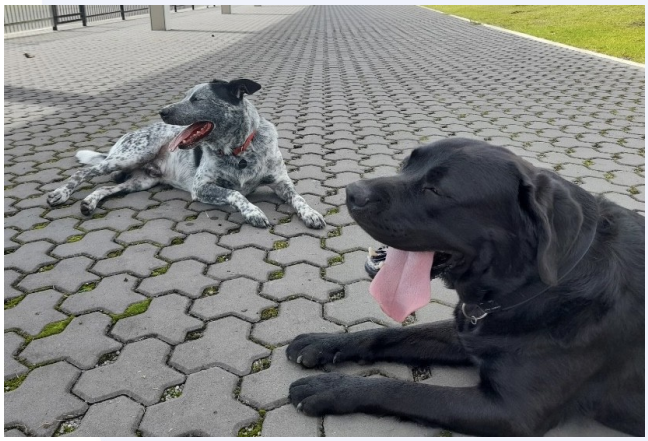
Watson & Co Superannuation Pty Ltd v Dixon Advisory and Superannuation Services Ltd (Settlement Approval) (FCA) - Court approved settlement of class action, gave directions to deed administrators, and allowed certain costs claimed by a litigation funder

In the matter of Riverina Solar Pty Ltd (NSWSC) - application to set aside statutory demand filed in Queensland and sent to NSW solicitors by email had not been validly served within the statutory time period

Waters v Diesel Holdings Pty Ltd (VSCA) - mandatory director disqualification for committing an offence involving dishonesty requires the offence can be classified as such on its face, without consideration of the circumstances of the particular offending

HABEAS CANEM

Panting pooches



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

Summaries With Link (Five Minute Read)

Watson & Co Superannuation Pty Ltd v Dixon Advisory and Superannuation Services Ltd (Settlement Approval) [2024] FCA 386
Federal Court of Australia
Thawley J
Representative proceedings - DASS was a financial services provider within the E&P Group of companies, which, from about 2011, gave advice to its clients to invest in URF, a US-based property investment and development fund focused on residential property, primarily in New York - at the same time, other companies in the E&P Group were being paid fees for managing the URF's assets and renovating its properties - this gave rise to an apparent conflict of interest - the URF did not perform well - applicants began a class action against DASS and deed administrators of DASS applied for directions and orders under s90-15 of the *Insolvency Practice Schedule (Corporations)*, being Schedule 2 to the *Corporations Act 2001* (Cth) - a settlement was agreed in the class action, and the applicants sought the Court's approval - a UK litigation funder applied for approval of part of the legal costs that it paid in relation to a competing class action which was stayed, as a form of common fund order - the deed administrators applied for orders approving their proposed process for the adjudication of claims to be made by DASS' creditors and the distribution of the deed fund once those claims have been assessed - held: the central question regarding settlement approval was whether the settlement was fair and reasonable in the interests of the group members as a whole - the terms of settlement reflected a fair and reasonable compromise of the group member's claims against the respondents - the settlement distribution scheme was fair and reasonable to the claimants - the Court allowed legal costs of a little over 80% of what was claimed for professional fees as recorded in the itemised account, together with full allowance for the 25% uplift - settlement approved - directions should be made in the terms sought by the deed administrators - the return likely to claimants under the settlement were already very small compared to the losses which they have sustained, and, while this was unfortunate, the evidence indicated that this was as much as was ever likely to be recovered - as to the UK litigation funder's claim, there was nothing unjust in funders wearing costs expended in their own pursuit of a commercial gain in circumstances such as the present - there is much which would be unjust in visiting the costs of unsuccessful funders on group members, particularly where there are many unsuccessful funders - there will be circumstances in which it would be "just" to order such costs, an obvious case being where there was a benefit obtained by group members from the funder's activities, particularly where the work was not duplicative and the benefit derived by group members is enduring - the litigation funder bore the onus of establishing that any amount was "just" - the costs of preparing a report that had been of assistance to the group members should be allowed - it was also just to allow certain costs associated with an application for leave to intervene in proceedings brought by ASIC, as this had lead to benefit for group members - other costs were not allowed.
Watson & Co Superannuation Pty Ltd
[From Benchmark Monday, 29 April 2024]

In the matter of Riverina Solar Pty Ltd [2024] NSWSC 480
Supreme Court of New South Wales
Williams J
Insolvency - Tellhow is a foreign company registered under Division 2 of Part 5B.2 of the *Corporations Act 2001* (Cth), which appointed a local agent whose office is in Sydney, and nominated that office of its local agent its registered office in Australia - it served a statutory demand on Riverina Solar, giving its solicitor's Sydney office address as the address for service - on the final day on which it could seek to set aside the statutory demand, Riverina filed an application to set it aside in the Queensland Supreme Court - Riverina's solicitors sent the application and associated material, including the material required by the *Service and Execution of Process Act 1992* (Cth) to the Sydney solicitors by email - these emails were received before midnight on the final day to seek to set aside the statutory demand - the Queensland Supreme Court transferred Riverina's application to set aside the statutory demand to the NSW Supreme Court - the Court determined as a separate question whether Riverina had served the application within time as required by s459G of the *Corporations Act* - held: s600G of the *Corporations Act* is a general provision that permits a very wide range of documents, including, but not limited to, any document required or permitted to be given under any provision of Chapter 5 of the *Corporations Act*, to be given by electronic communication - s15(3) of the *Service and Execution of Process Act* is in mandatory terms, and provides that service of initiating process in a state other than the state in which the process was filed must be effected in accordance with s9 of that Act - the potential inconsistency between s600G and s15(3) did not warrant s600G being read as inapplicable to the service of any and all applications to set aside statutory demands - however, s9(9) of the *Service and Execution of Process Act* t expressly excludes the operation of those provisions of the *Corporations Act* that cover the same field as, but are inconsistent with, s9 - the fact that s9 does not expressly exclude s600G provides no support for construing the general, facultative provisions of s600G as overriding the specific, mandatory provisions of s15(3) where the two provisions intersect - an application and supporting affidavit sent by email to the creditor's solicitors is not thereby left at the creditor's registered office within the meaning of s9(5) of the *Service and Execution of Process Act* - a solicitor is a fiduciary who acts on behalf of and in the interests of their client, but the solicitor's email and geographical addresses do not thereby become interchangeable with the addresses of the client - Riverina's application to set aside the statutory demand was not served within the statutory period.
View Decision
[From Benchmark Thursday, 2 May 2024]

Waters v Diesel Holdings Pty Ltd [2024] VSCA 77
Court of Appeal of Victoria
Ferguson CJ, Walker JA, & Ginnane AJA
Directors - a director was convicted of various offences, including causing injury intentionally, contravention of a family violence intervention order, contravening a conduct condition of bail,

and committing an indictable offence whilst on bail - he was sentenced to an imprisonment term of three years, one month and 14 days - s206B(1)(b)(ii) of the *Corporations Act 2001* (Cth) provides that a person is disqualified from managing corporations if the person is convicted of an offence that involves dishonesty and is punishable by imprisonment for at least 3 months - the director caused the company to commence legal proceedings - the defendants to these proceedings applied to have the proceedings dismissed, claiming that the director was automatically disqualified by s206B(1)(b)(ii), and so the company's claim had not been brought by its lawfully appointed director - the primary judge dismissed this application - the defendants sought leave to appeal - held: the primary judge had been correct to conclude that an offence involving dishonesty was one that can be classified as such on the face of the relevant offence provision or common law rule, without consideration of the circumstances of the particular offending - dishonesty does not need to be an element of the offence, but it does need to be inherent in the offence - none of the offences of which the director had been convicted had relevantly involved dishonesty in his sense, so as to engage the operation of s206B(1)(b)(ii) - leave to appeal granted but appeal dismissed.

Waters

[From Benchmark Wednesday, 1 May 2024]

Executive Summary and (One Minute Read)

R v Secretary of State for the Home Department (UKSC) - Failed asylum seeker who committed criminal acts within the UK and who thwarted his deportation was lawfully refused government benefits and was not denied his rights under the *European Convention on Human Rights*

Summaries With Link (Five Minute Read)

R v Secretary of State for the Home Department [2024] UKSC 13
Supreme Court of the United Kingdom
Lord Lloyd-Jones, Lord Sales, Lord Hamblen, Lord Stephens, and Lady Simler
AM was a national of Belarus. He arrived in the UK in 1998 and claimed asylum. In 2000, he was denied asylum status and removed to Belarus. He was denied entry to Belarus and returned to the UK because he provided Belarus officials with false information that caused the officials to believe that he was not a citizen. Upon his return to the UK, he committed various criminal offences and was classified as a foreign criminal by British authorities. The Government desired to extradite AM to Belarus, but he resisted these attempts. Further, the British authorities refused to grant AM Leave to Remain, which would entitle him to full government benefits. Instead, AM is in 'limbo' status under which (1) he may not seek employment in the UK, (2) he is not entitled to National Health Service benefits, excepting emergency care, (3) he may not open a bank account, (4) he may not enter into a tenancy agreement, and (5) he receives very limited social welfare benefits, at the same level of failed asylum seekers awaiting deportation. Instead, he received a payment card for food, clothing, and toiletries at a subsistence level and government accommodation. As AM may not return to Belarus, he claimed that the British Government's action of placing him in a legal 'limbo' amounted to a denial of his rights under Article 8 of the *European Convention of Human Rights*, and that the Government had to grant him Leave to Remain status that would enable him to obtain full public benefits. Article 8 provides that 'everyone has the right to respect for his private and family life' and that 'there shall be no interference by a public authority in the exercise of this right except as in accordance with law and is necessary in a democratic society in the interests of national security, public safety' - administrative tribunals and then the Court of Appeal agreed with AM, and ordered the Home Secretary to grant AM Leave to Remain status. On review, in a unanimous decision, the Supreme Court reversed the Court of Appeal and held that the Home Secretary did not violate AM's Article 8 rights by placing him in 'limbo' status. The Supreme Court found that AM's attempts to thwart his deportation were highly material factors in evaluating whether the Home Secretary's actions were proportional. The Court added that the

public interest in maintaining effective immigration controls and containing welfare expenditures were relevant considerations. There was also a public interest in maintaining British employment opportunities for those lawfully in the UK. The Court said that, given AM's serious criminal offences, his deportation was in the public interest, and his efforts to undermine that through fraudulent activity were also valid considerations. While AM was entitled to Article 8 protections, the Supreme Court concluded that his extended limbo status was a proportionate means of achieving the lawful aims of the British Government.
R v Secretary of State for the Home Department

Poem for Friday

Song of Hope

By: Thomas Hardy (1840-1928)

O sweet To-morrow! –
After to-day
There will away
This sense of sorrow.
Then let us borrow
Hope, for a gleaming
Soon will be streaming,
Dimmed by no gray –
No gray!

While the winds wing us
Sighs from The Gone,
Nearer to dawn
Minute-beats bring us;
When there will sing us
Larks of a glory
Waiting our story
Further anon –
Anon!

Thomas Hardy, (2 June 1840 - 11 January 1928), author and poet, was born in Dorset, England. His father was a stonemason, and his mother who was well read, educated Thomas to the age of 8, at which time Thomas commenced as a student at Mr Last's Academy for Young Gentlemen. On leaving school at the age of 16, due to his family's lack of finances to fund a university education, Thomas became an apprentice architect. Much of his work involved the restoration of churches. In 1862 he enrolled at King's College, London. He is best known for his novels, including *Far from the Madding Crowd,* (1874) and *Tess of the d'Urbervilles,* (1891). He was appointed a Member of the Order of Merit in 1910 and was nominated for the Nobel Prize in Literature in that year. He received a total of 25 nominations for the Novel Prize for literature during his life. Thomas Hardy died of pleurisy on 11 January 1928. He had wanted his body to be buried with his first wife Emma's remains at Stinsford. She had died in 1912 and much of his poetry was inspired by his feelings of grief following her death. His Executor Sir Sydney Carlyle Cockerell compromised by having Thomas Hardy's heart buried with the remains of his first wife Emma, and his ashes interred at Poets' Corner, Westminster Abbey. At the time of his death his estate was worth 95,418 pounds, the equivalent of over 6 million pounds

today. One of the largest literary societies in the world is the Thomas Hardy Society, based on Dorchester, https://www.hardysociety.org/.

Song of Hope by Thomas Hardy, read by Dylan Pearse, Music by Irish Folk Group, Kern
https://www.youtube.com/watch?v=Q1qo8sWTi6M

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