

Friday, 20 December 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)

Pleash v Bezel Pty Ltd (FCA) - liquidator succeeded in enforcing loans made to related companies, where those companies had sought to rely on deeds of forgiveness executed by common director

J&J Richards Super Pty Ltd ATF The J&J Richards Superannuation Fund v Nielsen (FCA) - applicant and class members in representative proceedings succeeded against directors and officers insurer of directors who had breached various provisions of the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth)

In the matter of Hammoud Investments Pty Limited (In Liquidation) (NSWSC) - judicial advice to liquidators they would not currently be justified in investigating and pursuing claims against director where creditors could be paid in full and the substantial beneficiary of success would be contributory



HABEAS CANEM

Merry Christmas from McGregor

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Summaries With Link (Five Minute Read)

Pleash v Bezel Pty Ltd [2024] FCA 1440

Federal Court of Australia

Cheeseman J

Corporations law - Eatrip made loans to Bezel and MP01, which had the same director - director later executed deeds of forgiveness, naming Eatrip as debtor and Bezel and MP01 as creditors, but now said this was mistake, and deeds forgave loans from Eatrip - Eatrip's liquidator sought to enforce loans - held: Bezel could not rely on forgiveness deed, as it had taken no role in the proceedings and had neither sought rectification nor led evidence Eatrip was estopped - loan to MP01 undocumented, and, on the evidence, Eatrip loaned the money in its own right, not as trustee - in any event, Court would have appointed liquidator as receiver of the trust - further, attempts to remove Eatrip as trustee had been ineffective, and Eatrip remained a bare trustee, and would have had standing to enforce loan in any event - MP01 failed to establish both conditions required to justify reading 'debtor' as 'creditor' (and vice versa) as a matter of contractual construction, namely (1) literal meaning was absurd; and (2) objective intention was self-evident - Court not satisfied MP01 never loaned money to Eatrip - in light of director's poor record-keeping practices, a cogent purpose of forgiveness deed may well have been to put beyond doubt that Eatrip did not owe anything to MP01 - equitable rectification claim failed, as Court again not satisfied common objective intention was to forgive MP01's debts to Eatrip - waiver and estoppel claims failed - judgment for Eatrip (in liq) in respect of the loans.

[Pleash](#)

[From Benchmark Tuesday, 17 December 2024]

J&J Richards Super Pty Ltd ATF The J&J Richards Superannuation Fund v Nielsen [2024] FCA 1472

Federal Court of Australia

Halley J

Insurance - a superannuation trustee commenced a class action against two companies and their directors for breaches of various provisions of the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) in making improvident loans without adequate security and contrary to representations made to investors - the only active respondent remaining was an insurer who was sued under the *Civil Liability (Third Party Claims against Insurers) Act 2017* (NSW) - the insurer had insured a number the directors of one of the companies under a directors and officers policy - the insurer resisted the claim on the basis that: (1) the directors' company had breached its duty of disclosure under s21 of the *Insurance Contracts Act 1984* (Cth); (2) a professional services exclusion in the policy, and (c) it was entitled to the benefit of a release granted to the directors by a court order, pursuant to s7 of the *Civil Liability (Third Party Claims against Insurers) Act* - held: trustee had proved directors contravened the statutory provisions alleged - applicant and group members could rely on the *Civil Liability (Third Party Claims against Insurers) Act* to claim indemnity under the policy - the matters not disclosed were clearly material to insurer's decision whether to bind cover for the

company - however, by ultimately deciding to bind cover without obtaining claims circumstances information the company would have had to provide had the insurer pressed for a completed proposal form, the insurer had waived the company's duty to disclose those matters - impugned conduct of the company and the directors did not constitute the provision of third party professional services for the purposes of the exclusion clause - the court order did not preclude the trustee from enforcing any judgment that it might obtain against the insurer - common questions answered so as to confirm liability of the insurer.

[J&J Richards Super Pty Ltd ATF The J&J Richards Superannuation Fund](#)

[From Benchmark Friday, 20 December 2024]

In the matter of Hammoud Investments Pty Limited (In Liquidation) [2024] NSWSC 1636

Supreme Court of New South Wales

Hammerschlag CJ in Eq

Corporations law - liquidators of a company applied for judicial directions under s90-15(1) of the *Insolvency Practice Schedule (Corporations)* as to (1) whether it would be reasonable to investigate and pursue possible claims against the company's director in circumstances where the creditors could be paid in full and the substantial beneficiary of success would be the company's contributory; and (2) whether they would be justified in pursuing a CGT concession which might be available to the company - held: if the contributory was granted leave to bring a derivative action on behalf of the company she would, almost inevitably, have to indemnify the company against losses constituted by its own costs and any costs of the defendants the company may have to pay - the contributory had not sought such leave - the application also assumed the company would be wound up and any surplus distributed to the contributory, and did not take account of the possibility that, in the light of the surplus, the director or other shareholders may move the Court to terminate the winding up - the liquidators would not be not justified in investigating or pursuing either of the foreshadowed claims unless, within a reasonable time, the contributory moved the Court for leave to bring a derivative action and failed, or another party applied for the termination of the winding up and failed.

[View Decision](#)

[From Benchmark Friday, 20 December 2024]

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INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Khachatryan v Armenia (EUHR5S) - In a matter of first impression, the European Court of Human Rights found that a member state has an obligation to provide a mechanism whereby victims of domestic violence may seek compensation for non-pecuniary damage from the perpetrator of the violence

Summaries With Link (Five Minute Read)

Khachatryan v Armenia, Case 11829/16

European Court of Human Rights

Guyomar P, Elósegui, Harutyunyan, Felici, Zünd, Sârcu, & Šimáková JJ

In Armenia, the victim had been subjected to numerous events of serious physical and emotional abuse by her former spouse. He repeatedly threatened and insulted her. He also repeatedly beat her, breaking bones and causing concussions and other grievous injuries. The perpetrator was charged with aggravated torture of a person who was dependent on the perpetrator. However, he was convicted of non-aggravated torture and sentenced to 18 months imprisonment. He did not serve any time as he was exempted under an Amnesty Act. The victim of the abuse unsuccessfully launched civil legal proceedings seeking compensation for both pecuniary and non-pecuniary damage for emotional and psychological suffering due to ill-treatment. Armenian domestic law did not provide for compensation for non-pecuniary damages in this situation. The judgment was affirmed by the local court of appeal. Armenia is one of the 46 member states comprising the Council of Europe and is subject to the European Convention on Human Rights and the jurisdiction of the European Court of Human Rights. The victim sought review of the decision by the Armenian courts by alleging that Armenia had acted in violation of Article 3 of the *European Convention on Human Rights*, which states that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. The Court found that the Armenian criminal-law mechanisms were so defective in terms of protecting the victim that they amounted to a breach of Armenia's obligations under Article 3. The European Court said that Armenia had repeatedly failed to discharge its procedural obligation to respond adequately to the serious acts of domestic abuse. In a decision of first impression, the Court also found that Article 3 imposed an obligation on the state to allow claims by the victim against the perpetrator for compensation for non-pecuniary damages in matters of serious domestic abuse. The Court stated that Article 3 created a positive obligation on the part of a member state in respect of allowing claims for non-pecuniary damage from the perpetrators of such violence directly, or indirectly through the member state. The European Court awarded the victim €24,000 plus €2000 in costs as against Armenia.

[Khachatryan](#)



Poem for Friday

Somewhere

By Rev David Conolly

Somewhere,
unexpectedly,
hope is born.

A voice.
At first, only the cry
of a new-born
gulping for breath.

In time, a voice.

The voice speaks to
a world grown used to
darkness, despair.

The voice says,
*You are light for the world;
Let it shine.
Love, and forgive*

And suddenly, hope is born.

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