



Friday, 21 June 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)

Lee v Dentons Australia Limited (FCA) - bankruptcy notice had been validly served

Sydney Subdivision Pty Ltd (in liq) v Chow (No 3) (FCA) - leave refused for a liquidator of a former trustee company to be appointed receiver of the trust

BBHF Pty Ltd v Sleeping Duck Pty Ltd & Ors (VSC) - allegation of oppression by a business advisor who had been given a minority shareholding dismissed

Re Stirloch Constructions Pty Ltd (VSC) - leave granted to a director to bring representative proceedings on behalf of the company against another director and a former director

HABEAS CANEM

Small dog, big surf



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Summaries With Link (Five Minute Read)

Lee v Dentons Australia Limited [2024] FCA 622

Federal Court of Australia

Cheeseman J

Bankruptcy - application for review of decision of Registrar to dismiss application to set aside bankruptcy notice - held: power to set aside a bankruptcy notice is not expressly conferred by the *Bankruptcy Act 1966* (Cth), but arises by necessary implication pursuant to the general powers conferred by s30(1) of that Act - the *Federal Court (Bankruptcy) Rules 2016* (Cth) provide the power may be exercised by a Registrar if the Court or a Judge so directs, and the Chief Justice had made such a direction - a review of a decision of a Registrar under s35A(5) of the *Federal Court of Australia Act 1976* (Cth) is by way of hearing *de novo*, and is not directed to a consideration of the correctness of the Registrar's decision or redressing error by the Registrar - substituted service orders, on their proper construction, had not precluded service of the bankruptcy notice being effected by one of the alternative modes of service set out in r102 of the *Bankruptcy Regulations 2021* (Cth) - the bankruptcy notice had served in accordance with r102 of the *Bankruptcy Regulations* - further, the application to set aside the bankruptcy notice was not made before the expiration of time fixed for the compliance with the notice - application for review of Registrar's decision dismissed.

[Lee](#)

[From Benchmark Tuesday, 18 June 2024]

Sydney Subdivision Pty Ltd (in liq) v Chow (No 3) [2024] FCA 644

Federal Court of Australia

Colvin J

Trusts - SSPL was the former trustee of a family trust - SSPL (in liq) and its liquidator sought orders against its former directors that they had breached their directors' duties and monetary compensation, including to recover under a loan the company had made to the directors - SSPL and the liquidator now sought interlocutory orders that the liquidator be appointed as receiver of the trust, to add the current trustee as a respondent, and to plead that the directors could not rely on any statutory limitation period - the directors sought summary dismissal of the loan case on the basis it was statute barred, as the loans had been made more than six years previously and were repayable on advance - held: the submission that the liquidator should be appointed receiver and that it was then the issue of the collection and application of the assets of the trust was a matter for trial failed to engage with the fact that the proceedings themselves involved SSPL and the liquidator exercising the rights associated with a loan to the directors that was said to be trust property - the liquidator was now seeking to pursue its loan case in the interests of creditors with subrogated claims to the proprietary right in the nature of an equitable charge said to be held by SSPL - neither the liquidator nor SSPL was the holder of the chose in action on which the loan case was based - as the legal holder of the chose in action the subject of the loan case, the current trustee was a necessary and proper party, and should be added as a respondent - the proposed limitation plea sought to anticipate the manner in which the directors

may plead limitation points in answer to the claims to be introduced if the amendments were allowed - SSPL and the liquidator may be able to plead limitation points by way of reply - the Court was not persuaded that the loan case had no prospect of success - summary judgment not granted to the directors - leave refused to amend to seek that the liquidator be appointed receiver of the trust.

[Sydney Subdivision Pty Ltd \(in liq\)](#)

[From Benchmark Wednesday, 19 June 2024]

BBHF Pty Ltd v Sleeping Duck Pty Ltd & Ors [2024] VSC 320

Supreme Court of Victoria

Delany J

Oppression - an advisor who had advised Sleeping Duck reached an agreement with the founders that he would receive 5% of the founders' shares and an option to acquire a further 5% - he alleged a common understanding that he would have active involvement in management, and that he held a legitimate expectation that any shareholder agreement entered into by Sleeping Duck would provide him with the right to appoint a director to the board and that director would have an effective veto on any resolution concerning the business of Sleeping Duck - the founder currently held 9.4% of the shares - he commenced proceedings alleging oppression - held: it has been held that the failure to meet the 'legitimate expectations' of a member or shareholder of a company formed as a 'quasi-partnership' could amount to oppression - a plaintiff may make a case of oppression by reference both to individual items of conduct and by reference to the cumulative effect of that conduct - fairness is not to be assessed in a vacuum. It is to be assessed in the context in which the conduct occurred and in relation to what is known at the time of the conduct and not in relation to what subsequently transpired - the test is objective - the oppressive conduct here had not been made out - application dismissed.

[BBHF Pty Ltd](#)

[From Benchmark Tuesday, 18 June 2024]

Re Stirloch Constructions Pty Ltd [2024] VSC 322

Supreme Court of Victoria

Waller J

Corporations law - a director of a construction company applied under s237 of the *Corporations Act 2001* (Cth) for leave to bring a proceeding on behalf of the company against another director and a former director and a company incorporated by them - the proposed proceeding would alleged that the other director had breached his director's duties and fiduciary duties owed to the company, and that the former director knowingly assisted the other director to breach his fiduciary duties - held: leave to bring a derivative action must not be given lightly - the applicant must show the five requirements in s237(2) are satisfied on the balance of probabilities, namely: (a) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; (b) the applicant is acting in good faith; (c) it is in the best interests of the company; (d) there is a serious question to be tried; and

(e) either notice was given to the company or it was appropriate to give leave without notice having been given - there was no issue here regarding (a) and (e) - the Court was satisfied the applicant director was acting in good faith, in that he honestly believed that a good cause of action existed which had reasonable prospects of success, for recovery of profits that would have been earned by the company but for the actions of the defendants - the applicant director responding to an offer of settlement by offering to settle only if the defendants separated from each other did not show that the applicant director was motivated by an improper or collateral purpose - in any event, where a plaintiff has multiple purposes for commencing an action, one of which is improper and collateral, there will be no abuse of process unless the improper and collateral purpose is the predominant purpose - the Court was satisfied it was in the best interests of the company to bring the proceedings - there was a serious question to be tried - leave granted to bring representative proceedings.

[Re Stirloch Constructions Pty Ltd](#)

[From Benchmark Wednesday, 19 June 2024]

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INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Food and Drug Administration v Alliance for Hippocratic Medicine (SCOTUS) - Plaintiff pro-life doctors and medical associations challenged Food and Drug Administration (FDA) decision to relax prescribing restrictions on a drug used to terminate pregnancies. The Court held the plaintiffs lacked standing to challenge the FDA decision

Summaries With Link (Five Minute Read)

Food and Drug Administration v Alliance for Hippocratic Medicine [2024] 602 US ____
Supreme Court of the United States

In 2021, the Food and Drug Administration (FDA) relaxed regulations for prescribing mifepristone, an abortion drug, to make the drug more accessible to women. The plaintiffs, consisting of pro-life doctors and medical associations, brought suit, alleging that the FDA regulations violated the *Administrative Procedure Act*. The District Court granted plaintiffs an injunction. The Court of Appeals found that plaintiffs had standing to sue and were likely to win on the merits. Reversing the lower courts, a unanimous Supreme Court held that the doctors and medical societies lacked standing to bring suit. Article III of the US Constitution limits the jurisdiction of federal courts to actual cases and controversies. The Court said that this is a matter of separation of powers. General complaints about how the government conducts its business are matters for the legislative and executive branches, not the judiciary. To establish standing, a plaintiff must demonstrate that (1) the plaintiff will likely suffer an injury in fact; (2) that the injury would likely be caused by the defendant; and (3) that the injury can be redressed by judicial relief. The plaintiffs are pro-life and do not prescribe the abortion drug. Nothing contained in the FDA regulations requires doctors to prescribe this drug. In short, the plaintiffs are acting to restrict the availability of the drug to others. While plaintiffs argued that they have suffered injury because doctors may suffer conscience objections when forced to perform abortions or perform abortion related treatment, the argument failed because federal conscience laws explicitly protect doctors from being required to perform abortions or other treatment that violates their consciences. The Court also rejected arguments that, if plaintiffs were not allowed to sue, then no one would have standing to challenge the FDA's actions. The Court said that even if this were true, it could not create standing and that some issues must be dealt with through the political and democratic processes and not the courts.

[Food and Drug Administration](#)

Poem for Friday

"Hope" is the thing with feathers (314)

By Emily Dickinson (10 December, 1830-15 May, 1886)

Hope is the thing with feathers -
That perches in the soul -
And sings the tune without the words -
And never stops - at all -

And sweetest - in the Gale - is heard -
And sore must be the storm -
That could abash the little Bird
That kept so many warm -

I've heard it in the chilliest land -
And on the strangest Sea -
Yet - never - in Extremity,
It asked a crumb - of me.

Emily Dickinson https://en.wikipedia.org/wiki/Emily_Dickinson

Emily Dickinson Museum https://en.wikipedia.org/wiki/Emily_Dickinson_Museum

Hope is the thing with feathers, sung by Nazareth College Treble Choir, Linehan Chapel,
Nazareth College

<https://www.youtube.com/watch?v=gDlSo4hEzmE>

Recitation 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

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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.

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