



Friday, 1 November 2024

Weekly Employment Law A Weekly Bulletin listing Decisions of Superior Courts of Australia covering Employment Law

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Executive Summary (One Minute Read)

Lynch v VLI Drilling Pty Ltd (NSWSC) - leave to commence workers compensation proceedings out of time, where there was a satisfactory explanation of the delay and the Court was satisfied a fair trial could still be had

Metrohm Australia Pty Ltd v Arumugam (NSWSC) - former employees restrained pending trial from carrying on a business that appeared to have been established using their former employer's confidential information

HABEAS CANEM

Pig, Dog and Bougainvillea



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Summaries With Link (Five Minute Read)

Lynch v VLI Drilling Pty Ltd [2024] NSWSC 1370

Supreme Court of New South Wales

Campbell J

Limitation periods in workers compensation cases - the plaintiff leave to commence proceedings out of time for work injury damages against the defendant pursuant to s151D of the *Workers Compensation Act 1987* (NSW) - the injury had occurred in 2013 and so the three-year limitation period under s151D had expired in 2016 - the defendant neither consented nor opposed leave being granted, although its position was that it would still rely on presumptive prejudice due to the effluxion of time, in accordance with the well-known comments of McHugh J in *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25; 186 CLR 541 - held: s151D is a statute of limitations in the traditional form, which bars the remedy but not the right - the limitation in s151D s151D(2) is subject to a very flexible discretionary power in the court to extend time which is not limited by any temporal long-stop by which a cause of action is extinguished - s151D also does not spell out any specific criteria or statutory conditions which limit or restrict the circumstances in which the court may exercise the power to grant leave out of time - the proper question for the judge to ask is whether it would be fair and just to grant leave, and it is not necessary that there be special or exceptional circumstances - whether the plaintiff has exercised forensic diligence in the promotion of his own legal rights is a relevant factor - generally this means the plaintiff must provide a full and satisfactory explanation for the delay - the persuasive onus at all times lies on the plaintiff and never shifts, including the onus of persuading the court that a fair trial is likely - here, there was a large body of extant documentation relevant to the defence of the case, and two relevant witnesses each appeared to have a good actual recollection of relevant facts concerning the issues that are likely to be litigated on liability - the Court was satisfied that, notwithstanding the great effluxion of time, there could be a fair trial of all the issues if leave were granted - the explanation for the delay was that the plaintiff made a good initial recovery following his surgery, but the effect of the shoulder injury was somewhat insidious and, as he continued to perform this heavy work, he did so with increasing difficulty - it was understandable he did not commence proceedings before the limitation period expired - his explanation for the delay was full and satisfactory - leave granted to commence proceedings out of time.

[View Decision](#)

[From Benchmark Thursday, 31 October 2024]

Metrohm Australia Pty Ltd v Arumugam [2024] NSWSC 1361

Supreme Court of New South Wales

Pike J

Restraint of trade - Metrohm manufactured high-precision instruments for chemical analysis, specialising in ion analysis spectroscopy - it employed a married couple as product managers, who were largely responsible for managing its electro chemistry department - both employees commenced personal leave and later made workers compensation claims, and requested

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separation agreements - Metrohm requested that they return all company property - an examination of their returned laptops showed that they had been accessed while the employees were on leave and after they had requested separation agreements, that attempts had been made to create a back-up of all emails, and that an external storage device had been inserted into one of the laptops - a to do list was also found on one of the laptops that appeared to be preparatory steps to establish a competing business, including researching and registering a company name - Metrohm then discovered that the employees had incorporated a company with that name that had an extensive online presence including a website, monthly blog posts and a LinkedIn page - Metrohm summarily terminated the employment of both employees - Metrohm commenced proceedings, and sought interlocutory orders restraining the two former employees from using its confidential information or intellectual property, and from continuing to carry on business through their company - held: the question whether there was a serious question to be tried reduced to the question whether there was a serious question that the post-termination restraints in the employment contracts would be held to be valid - restraints may be valid where they are reasonably necessary to prevent disclosure of confidential information acquired by a former employee in the course of employment, or the exploitation of a connection built up by that employee with the former employer's customers in the course of employment - Metrohm operated in a niche industry - the employees were specialised employees - reasonableness must be assessed at the date of the agreements - the period of restraint was relatively short - there was a serious question to be tried as to the validity of the post-termination restraints - the balance of convenience clearly favoured interlocutory relief being granted - where a negative covenant is being sought to be enforced, damages will rarely be an adequate remedy - interlocutory injunction granted.

[View Decision](#)

[From Benchmark Wednesday, 30 October 2024]

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INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Case of Kobaliya v Russia (EUHRTS) - European Court of Justice found that, in its overly broad definition of 'foreign agents', Russia committed multiple violations of the *European Convention on Human Rights*

Summaries With Link (Five Minute Read)

Case of Kobaliya v Russia, No 39446/16

European Court of Human Rights

Pastor Vilanova P, Schukking, Serghides, Roosma, Ktistakis, Mjöll Arnardóttir, & Kovatcheva JJ
Prior to its exclusion from the Council of Europe in 2022, Russia was bound by the *European Convention on Human Rights* and subject to the jurisdiction of the European Court of Human Rights. Here the activity in question occurred between 2012 and 2022 and related to fundamental rights to freedom of expression and assembly as guaranteed by the Convention. Under Russian law, non-governmental organisations (NGOs), media organisations, and individuals who received any foreign support were required to register as 'foreign agents' and conform to restrictions placed on persons so designated. The complainants alleged that the statutory definition was so overly broad as to impinge on rights to freedom of expression and freedom of assembly guaranteed by Articles 10 and 11 of the *European Convention*. The European Court found that the Russian legislation was unlawful because it was overly broad and employed the stigmatising term 'foreign agent' to a very wide universe of parties that could not all be lumped together as 'foreign agents'. Under Russian law, once designated as a foreign agent, substantial regulatory legislation attached curtailing the political rights of the parties so classified. By casting such a wide net, the term 'foreign agent' was used to circumvent basic *European Convention* rights.

[Case of Kobaliya](#)

Poem for Friday

Echo

By Christina Rossetti (1830-1894)

Come to me in the silence of the night;
Come in the speaking silence of a dream;
Come with soft rounded cheeks and eyes as bright
As sunlight on a stream;
Come back in tears,
O memory, hope, love of finished years.

Oh dream how sweet, too sweet, too bitter sweet,
Whose waking should have been in Paradise,
Where souls brimfull of love abide and meet;
Where thirsting longing eyes
Watch the slow door
That opening, letting in, lets out no more.

Yet come to me in dreams, that I may live
My very life again tho' cold in death:
Come back to me in dreams, that I may give
Pulse for pulse, breath for breath:
Speak low, lean low,
As long ago, my love, how long ago.

Christina Georgina Rossetti, born on 5 December, 1830, was one of the foremost poets of her era. Her father, Gabrielle, was an Italian Poet, and later chair of Italian at King's College, in London. Her mother Frances Polidor, an Anglo-Italian, home schooled her children in a climate of intellectual excellence. From 1845 Christina, by then a prolific poet, suffered an illness, that some consider was at least influenced by mental illness. She continued to have bouts of serious illness throughout her life. Rossetti's poetry, included the collections *Goblin Market and other Poems* (1862), *The Prince's Progress* (1866), *A Pageant* (1881), and *The Face of the Deep* (1882). Christina Rossetti died on 29 December, 1894.

Stanford Chamber Chorale, conductor, Stephen M Sano, with Laura Dahl, pianist, sing Norman Dello Joio's **Come to Me, My Love**, a setting of Christina Rossetti's "Echo"

<https://www.youtube.com/watch?v=NyJs5oqyygs>



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.

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