

Friday, 1 September 2023

## Daily Civil Law A Daily Bulletin listing Decisions of Superior Courts of Australia

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### CIVIL (Insurance, Banking, Construction & Government)

### Executive Summary (One Minute Read)

**Watson v Greenwoods & Herbert Smith Freehills Pty Ltd** (FCAFC) - 2019 amendments expanding whistleblower protection did not apply to detrimental conduct taken against whistleblowers before the amendments commenced (I B C)

**Hanwha Solutions Corporation v REC Solar Pte Ltd** (FCA) - patent owner failed to establish infringement of patent for a more efficient solar cell, and relevant claims of the patent were invalid for lack of novelty (I B)

**John Holland Pty Ltd v Bartlett** (FCA) - workers compensation - Administrative Appeals Tribunal erred by failing to make findings with respect to whether the worker had an incapacity to engage in work at the same level at which he was engaged by the employer (I B)

**Storer v State of New South Wales** (NSWSC) - the Court did not have enough evidence to make orders under the *Court Suppression and Non-publication Orders Act 2010* (NSW) in respect of the identity of alleged sexual abuse victims in subpoenaed material, but the Court exercised its inherent power to limit access to the subpoenaed material (I)

**Kadiev v Petrov** (NSWSC) - the three-month period before the Court can make a barring order under s93 of the *Probate and Administration Act 1898* (NSW) in respect of a claim against the estate cannot be abridged by the Court, or avoided by consent of the parties (I B)

# Benchmark

**Oxford (NSW) Pty Ltd v KR Properties Global Pty Ltd trading as AK Properties Group  
ABN 62 971 068 965 (No 5) (NSWSC)** - principal of building firm who had suffered adverse costs orders was bound by the admissions made by his counsel, whether or not those admissions had been made on instructions (I B C)

## HABEAS CANEM

Mr McGregor with his favourite boys



# Benchmark

## Summaries With Link (Five Minute Read)

### **Watson v Greenwoods & Herbert Smith Freehills Pty Ltd [2023] FCAFC 132**

Full Court of the Federal Court of Australia

Moshinsky, Abraham, & Raper

Whistleblowers - Greenwoods provided taxation advisory services to Lendlease - Watson was a partner of Greenwoods who worked on the Lendlease account - Watson claimed he disclosed concerns about Lendlease's financial statements and compliance with Australian taxation law to senior persons at Lendlease, and to other partners and directors of Greenwoods - he claimed he was then subjected to detrimental conduct, including removal from the Lendlease account, denial of paid sick leave, reduction of remuneration, and receipt of a notice of termination, and constructive dismissal - in 2019, the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth) amended the *Corporations Act 2001* (Cth) and the *Taxation Administration Act 1953* (Cth) regarding whistleblower protection: (1) widening of the scope of what disclosures qualify for protection; (2) allowing orders for compensation without a criminal offence being established; (3) making it sufficient to establish that detrimental conduct occurred because the wrongdoer "believes or suspects" that the whistleblower or any other person "made, may have made, proposes to make or could make a disclosure", rather than needing to establish that the conduct occurred because of the disclosure; (4) modifying the burden of proof for compensation so that the whistleblower need only adduce evidence that suggests a "reasonable possibility" that detrimental conduct occurred, at which point the wrongdoer assumes an onus to negative the claim; and (5) providing for civil penalties in addition to criminal offences - a judge referred questions to the Full Court as to whether the amendments applied to conduct engaged in before the amendments commenced, whether or not any detriment continued after commencement - held: the starting point of statutory interpretation is the text of the provision, having regard to its context and purpose - the general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, be understood as applying to facts and events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events - the transitional provisions provided for the amendments to have a limited retrospective effect, covering circumstances where a whistleblower makes a disclosure after commencement about matters that occurred before commencement - if the legislature intended the amendments to apply to detrimental conduct engaged in before commencement, it would have made this intention clear - the reasonable expectation is that, where a person engages in proscribed conduct, the conduct will be subject to the laws in force at the time that the conduct was engaged in - the amendments did not apply to detrimental conduct engaged in before their commencement.

[Watson](#) (I B C)

### **Hanwha Solutions Corporation v REC Solar Pte Ltd [2023] FCA 1017**

Federal Court of Australia

Burley J



# Benchmark

Patents - Hanwha, a South Korean company, owned an Australian patent related to the production of a more efficient solar cell using a double dielectric layer stack that reduces recombination losses by increasing surface passivation - Hanwha contended that products produced by REC Solar infringed its patent - Hanwha and its Australian subsidiary commenced proceeding against REC and two other companies that that REC had authorised to sell its products - Hanwha also claimed under the *Australian Consumer Law* - REC denied that its products fell within the scope of the patent, and also cross-claimed, alleging Hanwha had made unjustified threats of infringement, and that the claims in the patent said to be infringed were not valid, on the grounds of lack of novelty, lack of inventive step, lack of fair basis, lack of utility, and lack of clarity - held: each of the claims alleged to be violated was dependent upon both claims 1 and 9 - claim 1 was a method of manufacture of a solar cell of a particular construction and claim 9 was a solar cell of that construction - the Court made findings as to the proper construction of terms used in claims 1 and 9 - the Court did not publish its reasons relating to infringement in the light of the constructions it had reached, as REC had asserted confidentiality over much of the information concerning the make-up of its products - the parties should therefore have an opportunity to consider whether a redacted version of the infringement reasoning could be published - the Court concluded that the REC products did not fall within the scope of claim 9 - therefore, all claims for infringement failed - Hanwha's claims under the *Australian Consumer Law* therefore also failed - REC's claim for unjustified threats succeeded - REC's claims of lack of an inventive step failed - REC's claim of lack of a fair basis failed - a US patent anticipated four claims of Hanwha's patent, including claim 9 - these four claims were therefore invalid for want of novelty - REC's claim of lack of utility failed - REC claim of lack of clarity failed - parties to confer and supply draft orders giving effect to the Court's reasons and proposing a timetable for further steps in the proceedings.

[Hanwha Solutions Corporation](#) (I B)

## **John Holland Pty Ltd v Bartlett [2023] FCA 1030**

Federal Court of Australia

O'Sullivan J

Workers compensation - the respondent was employed by John Holland at the Shoal Bay Waste Disposal Facility in the Northern Territory - the respondent suffered from an increasing number of sneezing fits, as well as coughing, a continually runny nose, frequent headaches which could go on for many weeks, and lethargy, and was ultimately diagnosed with chronic sinusitis - the respondent lodged a claim for Workers' Compensation in relation to a "chronic sinus infection requiring multiple surgeries" caused by constant exposure to air borne dust and pollutants - John Holland ultimately terminated the respondent's employment on the basis that there were no reasonable adjustments that could be made to his role that would allow him to continue his employment - John Holland later determined that it was not liable to compensate the respondent after a certain date, because there had not been sufficient compliance with s54 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth), in that the medical reports and general medical certificates provided by the respondent did not specify the medical condition that resulted in an incapacity for work and did not assist in identifying the period within which the

# Benchmark

compensable injury resulted in an incapacity for work - the Administrative Appeals Tribunal set aside this decision and remitted the matter to John Holland for the quantification of entitlements - John Holland appealed to the Federal Court on questions of law - held: the question of whether the Tribunal erred in its construction of s54, was capable of being a question of law, and was a question of law in this case - however, John Holland's construction of s54 could not be accepted - once an injury has been accepted following a claim under s54, the provision of compensation for incapacity arising from that injury in the circumstances of this matter is dealt with in s19 - however, the Tribunal failed to consider directly and resolve the argument as to whether s54(1) had to be satisfied with respect to each period for which the respondent sought to be paid compensation arising out of the claimed injury under s19 - the Tribunal thereby erred in law - however, this error not such that it could realistically have resulted in a different decision, and so was not material - the Tribunal failed to make findings with respect to whether the respondent had an incapacity to engage in work at the same level at which he was engaged by John Holland in that work, specifically: (a) the level of the work the respondent was engaged in for John Holland immediately before the injury happened; and (b) in each relevant period for which compensation under s 19 was claimed, whether the respondent suffered an incapacity to engage in work at that same level - this error was material - the Tribunal also erred in law by failing to provide adequate reasons in this respect - appeal allowed, and the matter remitted to the Tribunal to be determined according to law.

[John Holland Pty Ltd](#) (I B)

## **Storer v State of New South Wales [2023] NSWSC 1043**

Supreme Court of New South Wales

Garling J

Suppression orders - the solicitors for the plaintiff served a subpoena on the proper officer of Catholic Church Insurance Ltd, relevantly seeking the production of all statements of persons alleging themselves to be child victims of Robert (Dolly) Dunn's sexual abuse or sexualized behaviour, all statements of persons alleging themselves to be child victims of Brother Ronald Blyth's (the former principal of Marist College, Penshurst) sexual abuse or sexualized behaviour, and all reports about or against Dunn alleging sexual abuse, touching, sexualized behaviour, physical abuse, excessive discipline or similar by Dunn - Catholic Church Insurance sought orders pursuant to the *Court Suppression and Non-publication Orders Act 2010* (NSW) prohibiting the disclosure of the names of the complainants, or other identifying details, to any person other than parties to the proceedings, and that the complainants be identified by pseudonyms to be agreed between the parties - held: the Court did not criticise Catholic Church Insurance for being concerned about taking such steps as are appropriate to ensure confidentiality and to limit the disclosure of such sensitive information - however, before any order can be made under the Act, the Court must be satisfied that such order is necessary for a purpose of prohibiting or restricting disclosure of that information - the Court was not so persuaded on the current evidence - without evidence addressing the particular circumstances of each of the names that may be revealed, it was not possible to conclude that an order under the Act was necessary - the better course was to exercise the inherent power of the Court when

# Benchmark

granting access to documents produced on subpoena to impose a confidentiality regime with respect to those who accessed the documents - orders made that access be granted, limited to solicitors and counsel retained to act for each of the plaintiff and the first, second, and third defendants, and that that any inspection of the documents in unredacted form be limited to the parties, instructed solicitor, and counsel, and that such parties, solicitors, and counsel will not further use or disclose the identifying details of complainants other than the plaintiff without the leave of the Court.

[View Decision](#) (I)

## **Kadiev v Petrov [2023] NSWSC 1031**

Supreme Court of New South Wales

Meek J

Succession - the Court granted probate of the will of the deceased to the plaintiff - the plaintiff had a notice of intended distribution of an estate in the approved form published on the NSW Online Registry website - the defendant's solicitors served on the plaintiff's solicitors a claim on the estate in for \$180,000 - the basis of the claim was that the deceased and the husband of the defendant undertook renovation work on a property at Arncliffe 25 years previously and that the plaintiff executrix was aware of the work being undertaken, and that the sale price of the property was achieved partly due to the renovation work undertaken by the husband of the defendant and the deceased - the plaintiff's solicitors served a notice disputing the claim pursuant to s93 of the *Probate and Administration Act 1898* (NSW) on the defendant - the effect of the notice under s93 was that, if the defendant did not prosecute the claim within three months, the plaintiff could apply for an order barring the claim as against the executor - the plaintiff commenced proceedings for such an order - the parties notified the Court that they agreed and consented to the order under s93 being made - the Court was not prepared to make the order, and asked the parties to make submissions whether a barring order may be made pursuant to s93(2) before the lapsing of the three-month period or whether the Court had power to abridge the time referred to in s93(2) - held: statutory construction involves the Court looking at text, context and purpose - whether language is plain and unambiguous is a conclusion which can only be reached after regard is had to context and purpose - s93 has been described as a procedure which enables an executor or administrator to bring to a head any unresolved claims of which the executor has notice - also, s93 has a practical effect of casting on the claimant the onus of proving in litigation the claim - there is no express wording in s93 suggestive that the Court may abridge or shorten the period within which a barring order may be made - there was nothing in particular about the structure of s93 which suggested that the expiry of the three month period was not mandatory in its terms - the appropriate construction of the three-month period is that it is a mandatory minimum period which is a precondition to the Court making a barring order, which is not able to be abridged by the Court - generally, parties cannot by consent confer jurisdiction on a Court to make orders which the Court lacks power to make - the parties' consent therefore did not allow the Court to make the barring order sought - however, the three month period had expired on 25 August 2023 - barring order made.

[View Decision](#) (I B)



**Oxford (NSW) Pty Ltd v KR Properties Global Pty Ltd trading as AK Properties Group  
ABN 62 971 068 965 (No 5) [2023] NSWSC 1040**

Supreme Court of New South Wales

Stevenson J

Building and construction - the defendants contracted to buy land in Gerringong - before settlement, they entered into a contract with the plaintiff builder under which the builder agreed to obtain a construction certificate and construct a six unit apartment building on the land - the builder purported to suspend the works - the owners purported to terminate the contract, and had the work completed - the builder sued for the amounts claimed in nine invoices - the owners cross-claimed against the builder in contract, seeking damages for the costs in completing the works, rectifying defective works, and interest on the borrowings needed to make these payments - the owners also sued the principal of the builder under s37 of the *Design and Building Practitioners Act 2020* (NSW) - the Court had previously dismissed the builder's claim for damages (see Benchmark 12 April 2023) and upheld a claim against the principal (see Benchmark 31 July 2023) - the Court also ordered that the principal pay the owners' costs of the cross-claim against him, and interest on the owners' costs and disbursement - the principal applied for the costs orders to be set aside - he contended that his counsel had made concessions and admissions without instructions that led to the personal costs orders against him; held: the Court did not know, and expressed no view about, whether counsel had made the concessions and admissions without instructions - the wider point was that a lawyer retained to conduct legal proceedings has implied authority to make admissions against interest, particularly where, as here, the admissions were made in relation to issues directly in contest in the litigation - the Court doubted that the costs orders concerning the principal's obligation to pay costs were made in his "absence" for the purposes of r6.16(2)(b) of the *Uniform Civil Procedure Rules 2005* (NSW), as "absence" requires more than a physical absence when the order was made, but rather some added factor that makes it unjust for the order to stand - it had been agreed that the question of the form of the final orders would be determined on the papers, and the principal, by his counsel, agreed to the directions for submissions to be made in that respect - the principal accepted that he had failed to comply with the directions to which he, by his counsel, had consented - in any event, the principal's explanation for his "absence" was unsatisfactory - the Court will not usually exercise its discretion to set aside a judgment that was regularly obtained where the applicant had notice of the hearing and chose not to appear, which is what had happened here - principal's motion dismissed with costs.

[View Decision](#) (I B C)

## Poem for Friday

### My Dead Dream

**By:** Sarojini Naidu (1879-1949)

Have you found me, at last, O my Dream? Seven eons ago  
You died and I buried you deep under forests of snow.  
Why have you come hither? Who bade you awake from your sleep  
And track me beyond the cerulean foam of the deep?  
Would you tear from my lintels these sacred green garlands of leaves?  
Would you scare the white, nested, wild pigeons of joy from my eaves?  
Would you touch and defile with dead fingers the robes of my priest?  
Would you weave your dim moan with the chantings of love at my feast?  
Go back to your grave, O my Dream, under forests of snow,  
Where a heart-riven child hid you once, seven eons ago.  
Who bade you arise from your darkness? I bid you depart!  
Profane not the shrines I have raised in the clefts of my heart.

**Dr. Sarojini Naidu**, born Sarojini Chattopadhyaya, in Hyderabad, India on 13 February 1879, was a child prodigy, and considered to be brilliant intellectually as a poet, linguist, writer and political activist. She won a scholarship to Kings College, London where she studied from 1895, when she was 16 years of age, and later at Madras University and Girton College, Cambridge. She married in 1898, to Dr Naidu, a marriage supported by both their parents, although the inter-caste marriage was at that time in India considered to be against societal norms, and even criminal in some parts of society. They had five children. She spoke many languages fluently. In 1905 she joined the Indian Nationalist Movement, and met Mahatma Gandhi in 1916. She worked in the movement for freedom for India from British control, and for women's rights and civil rights. For 3 years from 1915 she travelled throughout India giving political lectures. She was arrested and imprisoned for two years because of her political activism. In 1925 she became the President of the Indian National Congress and from 1947 she was Governor of the United Provinces (later Uttar Pradesh). She received the Hind Kesari medal in 1928. She wrote books, poetry and songs throughout her life. She died on 2 March 1949. As a poet, she was referred to as the "Nightingale of India". Her birthday, 13 February, is celebrated as Women's Day in India.

[https://en.wikipedia.org/wiki/Sarojini\\_Naidu](https://en.wikipedia.org/wiki/Sarojini_Naidu)

**Sarojini Naidu**, gives a speech in the USA on her arrival in 1928

[Sarojini Naidu, gives a speech in the USA on arrival](#)

**Dr Sarojini Naidu**, 11 December 1946, Constituent Assembly Speech,



# Benchmark



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