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

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Executive Summary (One Minute Read)

Whelan v Oldfield Entertainment Pty Ltd (FCA) - Court refused summary judgment regarding victimisation claim under the *Sex Discrimination Act 1984* (Cth) by an actress, but struck out the relevant paragraph in the statement of claim with leave to replead (I)

Kuksal v Victorian Legal Services Board (Recusal, Stay and Costs) (VSC) - a judge should not recuse him or herself for apprehended or actual bias merely because repeated applications are made that he or she do so (I B)

VOVI International Pty Ltd v VОВI Australia Charity Association Incorporated (QSC) - a purported new spiritual leader of a religion was not the new spiritual leader, and so she had not been able to replace the trustee of a charitable trust associated with that religion (I B)

Harbour Capital Asset Management Pty Ltd & Ors v Airphysio Pty Ltd & Ors (QSC) - Court made findings about whether subsequent dealings constituted a breach of a deed regarding intellectual property (I B)

Nepean Conveyors Pty Ltd v Linkforce Industrial Services Pty Ltd (WASC) - Court declined to grant an interlocutory injunction restraining a contractor from making a second adjudication application regarding a payment claim under the security of payments legislation (I B C)

Summaries With Link (Five Minute Read)

Whelan v Oldfield Entertainment Pty Ltd [2024] FCA 193

Federal Court of Australia

Raper J

Human rights - Whelan is an actress, singer and performer who was employed by Oldfield Entertainment in 2013 and 2014 to perform the role of "Janet" in Oldfield Entertainment's production of The Rocky Horror Show - Craig McLachlan was employed by Oldfield Entertainment to play the lead role of 'Frank-n-Furter' in that show - Whelan claimed that McLachlan inappropriately kissed her, touched her and used sexualised language to refer to other female employees involved in the show - Whelan commenced proceedings, claiming that she had been subjected to sex discrimination, sexual harassment, and victimisation under the *Sex Discrimination Act 1984* (Cth) - Oldfield Entertainment sought that certain claims be summarily dismissed or the relevant paragraphs of the statement of claim be struck out - to give summary judgment, the Court must be satisfied that the proceedings were attended with no reasonable prospects of success and must be conscious that such a power must not be exercised lightly - for a claim of victimisation to be made out, Whelan had to show that Oldfield Entertainment subjected, or threatened to subject, her to a detriment, which must be real and not trivial, and there must be a causal connection between the detriment and one of the matters listed in s47A(2)(a)-(h) or s94(2)(a)-(h) of the *Sex Discrimination Act*, and the ground must be a substantial and operative factor - while there was ambiguity in the pleading, Whelan had pleaded each of the essential indicia required to prove a claim of victimisation - the Court would not grant summary judgment - however, the Court would strike out one paragraph of the statement of claim with leave to replead - this paragraph alleged that Oldfield Entertainment unlawfully victimised Whelan - there was a necessity for Whelan to plead with some precision what she says were the acts or proposed acts she undertook (or Oldfield Entertainment's belief of the same), and how those acts fell within the relevant provisions of the *Sex Discrimination Act* - it was clear from Whelan's submissions, and in answers to questions that were raised with Whelan's counsel, that, despite the pleading not saying so in express terms, Whelan relies on certain informal bullying complaints as constituting acts by her (or otherwise falling within the remit of the relevant provision) from which she asserts she suffered a detriment - however, this was unclear in the pleading.

[Whelan](#) (I)

Kuksal v Victorian Legal Services Board (Recusal, Stay and Costs) [2024] VSC 78

Supreme Court of Victoria

Gorton J

Bias - the Victorian Legal Services Board appointed a person to conduct a compliance audit of a law firm, and issued Management Systems Directions to the firm - the Board then appointed an investigator into suspected offences in connection with the firm and then appointed an external manager to the firm - the external manager, with the assistance of the Board, entered the firm's premises and took possession of its files and other assets - the principals of the firm commenced proceedings, seeking, among other things, declarations that the Board's appointment decisions were nullities - a Judicial Registrar made case management directions,

and the plaintiffs appealed to a judge of the Court - the judge dismissed the appeal - the same judge then rejected other applications made by the plaintiffs, including that he recuse himself - the plaintiffs now sought again that the judge recuse himself - held: the judge rejected the submission that he should recuse himself - if he had made errors in his handling of the plaintiffs' matters, the plaintiffs could raise these concerns with the Court of Appeal - the making of an error is not of itself a reason for which the fair-minded lay observer might reasonably apprehend that a judge might not bring an impartial mind to the resolution of the issues that arise - it would be wrong for a judge to recuse simply because repeated applications for recusal had been made - a judge has a duty to exercise his or her judicial function when assigned to a case and litigants could not be allowed to influence the composition of the Court by making repeated applications for recusal.

[Kuksal](#) (I B)

VOVI International Pty Ltd v VOVl Australia Charity Association Incorporated [2024] QSC 38

Supreme Court of Queensland

Henry J

Trustees - some members of the VOVl religion were in dispute as to whether the plaintiff company had been replaced by the defendant company as trustee of the VOVl Charitable Trust - under the deed that established the trust, the plaintiff was the trustee, and the power of removal and appointment of trustees was given to an "appointor" or, if there is no such person, the trustee - the Appointer was defined as "Si Hang Luong, the Spiritual Leader of the VOVl religion, or in the event of his death the Spiritual Leader for the time being of the VOVl religion" - Si Hang Luong, known as "the Master", died in 2009, and a person who claimed to be the Spiritual Leader for the time being of the VOVl religion purported to remove the plaintiff as trustee and appoint other trustees, most recently the defendant, as trustee - the plaintiff commenced proceedings, seeking a declaration that it was still the sole trustee of the VOVl Charitable Trust - held: the determinative question was whether the purported new leader was "the Spiritual Leader for the time being of the VOVl religion", within the meaning of those words in the deed of settlement, when she purported to remove and appoint trustees - the deed's definition of "Appointor" seemed to implicitly contemplate that someone would succeed the Master, in the event of his death, as the Spiritual Leader of the VOVl religion - the Master and his potential successor on his death were each referred to in the deed as "the" Spiritual Leader, not "a" Spiritual Leader", and the deed also referred to "the Spiritual Leader for the time being of the VOVl religion", and not the Spiritual Leader for the time being of the VOVl religion "in Australia" - the only evidence of any role of the purported new leader in respect of the VOVl religion suggested at the highest that she performed an organisational role in Australia, with elements of financial or administrative management - no evidence was adduced to suggest that she was recognised as or reputed to be the Spiritual Leader among followers of the VOVl religion - it followed she was not the Appointer under the deed - declaration made as sought by the plaintiff.

[VOVI International Pty Ltd](#) (I B)

Harbour Capital Asset Management Pty Ltd & Ors v Airphysio Pty Ltd & Ors [2024] QSC

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Supreme Court of Queensland

Bradley J

Contracts - the parties were in dispute about their respective rights relating to a handheld device known as "AirPhysio" - AIPH owned the intellectual property associated with the product, including certain registered designs and trademarks - in 2016, HCAM, AP, AIPH, and certain individuals were in dispute about a possible sale of shares in AP and AIPH by the individuals to HCAM, and an alleged right of first refusal in respect of the sale of those shares, which they settled by heads of agreement after a mediation - in 2017, AP, AIPH, HCAM and the individuals executed a deed called the "Share Sale and Royalty Deed" - later in 2017, 2017, AIPH and AP executed a written agreement entitled "AirPhysio Pty Ltd Licence to Use Intellectual Property" - HCAM sued AP and AIPH - the Court directed four questions be determined separately: (1) did entry into the BBD Licence Agreement breach the Deed? (2) if "yes" to Question 1, was notice required to be given in accordance with the Deed? (3): did AP, to facilitate the transaction effected by the BBD Licence Agreement, transfer or assign its exclusive manufacturing and distribution rights it had under the AP Licence Agreement in breach of the Deed? and (4): if "yes" to Question 3, was notice required to be given in accordance with the Deed? - as to Question 1, AIPH breached a covenant in the Deed by failing to give HCAM an IPR Transfer Notice once AIPH wished to enter into the BBD Licence Agreement and before it did so - as to Question 2, AIPH was obliged to give HCAM an IPR Transfer Notice in accordance with the Deed once AIPH wished to enter into the BBD Licence Agreement and before it did so - as to Question 3, AP relinquished to AIPH the exclusive right to use and exploit the identified intellectual property rights in the business of marketing and distributing the product to facilitate a transaction of the kind effected by the BBD Licence Agreement, and AP had breached the Deed by failing to give HCAM a Product Transfer Notice once AP wished to enter into the AP Licence Amendment by which it relinquished its exclusive right and before it did so - as to Question 4, AP was obliged to give HCAM a Product Transfer Notice in accordance with the Deed once AP wished to enter into the AP Licence Amendment and before it did so - all four questions answered "yes" - parties to confer and submit either a joint draft order or competing draft orders reflecting the findings in the Court's reasons and dealing with the further conduct of the proceeding.

[Harbour Capital Asset Management Pty Ltd & Ors](#) (I B)

Nepean Conveyors Pty Ltd v Linkforce Industrial Services Pty Ltd [2024] WASC 71

Supreme Court of Western Australia

Seaward J

Security of payments - the plaintiff entered into a contract with Roy Hill Iron Ore to construct two overland conveyor systems - the plaintiff then entered into a contract with the defendant to construct the two overland conveyor systems the subject of the Roy Hill contract - the defendant submitted progress claim No 20 under the *Construction Contracts (Former Provisions) Act 2004* (WA) in the gross amount of about \$83million claiming a net amount payable of about \$23million



- the plaintiff responded that the defendant owned the plaintiff about \$3.7million - the defendant applied for adjudication - the adjudicator determined the plaintiff was required to pay the defendant about \$1.3million - the defendant proposed to lodge a second adjudication application claiming about \$18million - the plaintiff applied for judicial review of the first adjudication decision and a declaration that the contract was not a construction contract for the purposes of the *Construction Contracts (Former Provisions) Act* - the plaintiff also applied for an interlocutory injunction restraining the defendant from commencing the second adjudication application - the Court now dealt with the application for the interlocutory injunction - held: the two main enquiries were whether the plaintiff had made out a prima facie case and whether the balance of convenience favoured the grant of the injunction - the *Construction Contracts (Former Provisions) Act* provides a means for adjudicating payment disputes arising under 'construction contracts', and it achieves this purpose by providing for a party to a 'payment dispute' to apply to have the dispute adjudicated - a determination made by an adjudicator does not finally determine the rights, duties or liabilities of any party to a construction contract - the central subject to which the Act applies is a construction contract, and the Court of Appeal has made it clear that the power of an adjudicator under the Act to determine a payment dispute is conditional upon the objective existence of a construction contract as defined by the Act - the primary basis of the plaintiff's case in both the application for judicial review and the application for a declaration is that the contract was not a construction contract for the purposes of the Act because it concerned construction work falling within the 'mining exception' contained in s4(3)(c) - there was a serious question to be tried in this respect - however, the plaintiff's legal interests and ability to advance its desired legal arguments were adequately protected in the event that the injunction is not granted - further, the grant of an injunction would undermine the objects and purpose of the Act in that it would prevent the defendant from exercising its rights to engage in the very process the Act permits, and for the payment dispute to be resolved on an interim basis in a timely fashion - the balance of convenience was therefore against ordering the injunction - application dismissed.

[Nepean Conveyors Pty Ltd](#) (I B C)

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