

Friday, 12 May 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)

**New Aim Pty Ltd v Leung** (FCAFC) - primary judge had wrongly dismissed claim for misuse of confidential information as he had erred in his approach to whether the alleged confidential information was confidential and in rejecting the evidence of an expert witness (I B)

**Veolia Water Australia Pty Ltd v Centennial Springvale Pty Limited** (FCA) - preliminary discovery allowed where the documents sought were directly relevant to the proposed claim for relief (I B C)

**Aerolink Air Services Pty Ltd v Bankstown Airport Ltd** (NSWCA) - primary judge had not erred in rejecting claims for breach of duties as bailee in respect of five logbooks said to have been destroyed following a fire in a hangar (I B)

**Anchorage Capital Master Offshore Ltd v Sparkes** (NSWCA) - CFO and Group Treasurer of a failed listed public company were not liable to lenders who claimed to have been misled by false representations of no change in financial position constituting a material adverse effect and false representations of solvency (I B)

**Sullivan v Greig** (QSC) - challenge to a will made by a terminally ill person one day before her death failed - the Court was satisfied the deceased had signed the will and had had testamentary capacity (I B)

**Hartland v Firm Construction Pty Ltd (in liq) [WASC]** - leave granted (on terms) to commence personal injury proceedings against a construction company in liquidation as there was a potential insurer standing behind the insolvent company (I B C)

## HABEAS CANEM

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# Benchmark

## Summaries With Link (Five Minute Read)

### **New Aim Pty Ltd v Leung [2023] FCAFC 67**

Full Court of the Federal Court of Australia

Kenny, Moshinsky, Banks-Smith, Thawley, & Cheeseman JJ

Confidential information - New Aim conducts a large online retail business in Australia and sources its products from a range of suppliers in China - Leung commenced employment with New Aim as a junior office assistant in 2009, and increased in seniority over the years until being appointed Chief Commercial Officer in 2020 - he resigned in 2021 - Broers Group Pty Ltd and Sun Yee International Pty Ltd also conduct online retail businesses in Australia and are competitors of New Aim - Broers sources its products from China and Sun Yee sources its products from Broers - New Aim contended Leung had disclosed the identity and contact details of certain suppliers to Broers and had used that information for the benefit of Broers and Sun Yee - New Aim sued Leung, Broers, Sun Yee, and two other parties, claiming that Leung had breached an equitable obligation not to reveal or use confidential information acquired during the course of his employment with New Aim, had breached his employment contract with New Aim, and had contravened s183 of the *Corporations Act 2001* (Cth) (which provides that a person who obtains information because they are, or have been, a director, officer, or employee of a corporation must not improperly use that information to gain an advantage for themselves or someone else, or to cause detriment to the corporation) - the primary judge dismissed New Aim's action - New Aim appealed against the dismissal of its claims against Leung, Broers, and Sun Yee - as New Aim had raised an issue regarding s183 that may have required the Full Court to overturn a previous Full Court precedent, the Full Court was constituted by five judges - held: the primary judge erred in entirely rejecting the evidence of an expert witness - it would not ordinarily be concluded from the fact that the final letter of instructions to the expert is dated the day before the final expert report that the expert only started work on the report once the final letter of instruction was sent - the primary judge had erred in his approach to the issue of whether the alleged confidential information was confidential - the primary judge erred in this respect by treating supplier details stored in Leung's WeChat app as being distinct from the details of those suppliers stored in the New Aim Purchasing System - appeal allowed and the claims against Leung, Broers, and Sun Yee remitted for retrial - the Full Court considered it would be appropriate for the retrial to be before a different judge, but did not consider it necessary to specify this in its orders.

[New Aim Pty Ltd](#) (I B)

### **Veolia Water Australia Pty Ltd v Centennial Springvale Pty Limited [2023] FCA 443**

Federal Court of Australia

Goodman J

Preliminary discovery - Veolia owns and operates a purpose-built water treatment facility that treats water from the Springvale and Angus Place mines owned by the prospective respondents - operations at the mines produce excess water from cooling mining equipment and suppressing dust, and this water has to be removed from the mines - the water then has to be treated to

# Benchmark

remove contaminants - Veolia had successfully tendered to design and construct the water treatment plant after a call for expressions of interest by the prospective respondents - Veolia had made requests for information during the tender process and the prospective respondents had responded with data showing the quality of water that the mine would provide - Veolia contended the quality of water from the mine was materially different from what it had been told - Veolia contended it may have a right to sue for misleading and deceptive conduct or negligent misrepresentation, and sought preliminary discovery - held: r7.23 of the *Federal Court Rules* allows a prospective applicant to apply for preliminary discovery if it reasonably believes that it may have the right to obtain relief in the Court from a prospective respondent whose description has been ascertained, and, after making reasonable inquiries, it does not have sufficient information to decide whether to start a proceeding, and it reasonably believes that the prospective respondent has, or is likely to have, or has had, or is likely to have had, documents in its control directly relevant to the question of the right to obtain the relief, and inspection of the documents would assist in deciding whether to bring proceedings - if these criteria are satisfied, the Court then has discretion whether to make the order - the contentious issues were whether Veolia had established that it reasonably believed that it may have the right to obtain relief, and whether the documents sought were directly relevant to that question - the Court was satisfied Veolia reasonably believed that it *may* have a right to obtain relief - Veolia had made reasonable inquiries and did not have sufficient information to decide whether to commence the proposed proceedings - the Court was satisfied that documents recording data taken from individual bores and from the combined water pipe (but not limited to any particular sampling point) up to a certain date were directly relevant, and that inspection of those documents would assist Veolia in deciding whether to sue - the Court was also satisfied Veolia held a reasonable belief to that effect - the conditions for preliminary discovery were established, and the Court's discretion should be exercised by making orders for preliminary discovery.

[Veolia Water Australia Pty Ltd \(I B C\)](#)

## **Aerolink Air Services Pty Ltd v Bankstown Airport Ltd [2023] NSWCA 92**

Court of Appeal of New South Wales

Meagher & Kirk JJA, & Simpson AJA

Bailment - Aerolink subleased or sublicensed a hangar from Bankstown Airport Ltd - after this sublease or sublicense had expired, and Aerolink was in the process of removing its property from the hangar, a fire occurred, causing extensive damage - a director of Aerolink was able to retrieve some property, but was then prevented from re-entering the hangar due to safety concerns - the property remaining the hangar was then contaminated with asbestos - Bankstown Airport later used all the property remaining in the hangar as landfill - a single judge found that Bankstown Airport was not liable in negligence, but had breached its duty as bailee of Aerolink's property that survived the fire - the such property that would lead to more than nominal damages consisted of the logbooks for four fixed wing aircraft and one helicopter - the primary judge conducted a hearing on damages in respect of these logbooks, and dismissed the claim regarding them - the primary judge found that three of the fixed-wing aircraft logbooks had been destroyed by the fire, rather than by Bankstown Airport's breach of duties as a bailee,

# Benchmark

that the helicopter logbook had been among the items the director of Aerolink had removed after the fire, and that he was not satisfied that the remaining fixed-wing aircraft logbook was in the hanger, survived the fire, and was not removed by Aerolink's director - Aerolink appealed, limited to the primary judge's findings regarding the helicopter logbook and the fixed-wing aircraft logbook that the primary judge had dealt with on the basis of lack of satisfaction - held: the primary judge had rejected much of Aerolink's director's evidence as unreliable in the face of objectively established and contemporaneous facts - however, the Court was not required to exercise any particular restraint with respect to the primary judge's findings on the credit of the director, as the primary judge had made plain that his findings on credit were not based on demeanour - the weight of the evidence supported the finding made by the primary judge that an archive box removed by the director following the fire contained the helicopter logbooks - the primary judge had not erred in failing to be satisfied of the relevant matters regarding the final fixed-wing aircraft logbook - the primary judge had been justified in regarding the director's evidence as to this logbook as unreliable - appeal dismissed.

[View Decision](#) (I B)

## **Anchorage Capital Master Offshore Ltd v Sparkes [2023] NSWCA 88**

Court of Appeal of New South Wales

Ward P, Brereton JA, & Griffiths AJA

Consumer law - Arrium was a listed public company with financing arrangements with several lenders - over \$1 billion of debt was due to mature and its business was being affected by falling iron ore prices - Arrium issued numerous drawdown and rollover notices to its lenders, who then advanced funds or rolled over debts - each notice contained a representation that there had been no change in Arrium's financial position that constituted a material adverse effect, and a representation that Arrium was solvent - those representations were also deemed to be made when the drawdowns or rollovers occurred - the Board ultimately resolved to include a Going Concern Note in its half-year accounts - two groups of lenders brought proceedings against Arrium's CFO and Arrium's Group Treasurer for losses suffered by reliance on the representations - the primary judge dismissed these claims - the lenders appealed - held: the primary judge did not err in finding the lenders had not shown the material adverse effect representations were false before the Board resolved to include the Going Concern Note - a company is only insolvent when it is unable to pay its debts as and when they fall due - the primary judge had not erred in finding that the appellants had not shown Arrium was insolvent at the relevant times - the primary judge did not err in finding that Arrium did not owe the lenders a duty of care when making the representations - the primary judge did not err in finding that neither the CFO nor the Group Treasurer could be liable in respect of any breach of duty by Arrium, either directly as a joint tortfeasors or as accessories - the primary judge erred in holding the Group Treasurer owed a personal duty of care in respect of a certain conversation with a lender - the Group Treasurer was acting in that conversation only in her capacity as an officer of Arrium and the lender would have understood that - the primary judge was correct to find the CFO and Group Treasurer had to have actual knowledge of the falsity of a representation for them to be liable as accessories - the primary judge did not err in finding that

neither the CFO nor the Group Treasurer personally engaged in misleading or deceptive conduct, even if the representations had been false - the primary judge did not err in finding that the lenders had not shown that the representations had caused their losses - the lenders had failed to lead evidence that they had had regard to the representations, and there was evidence that the lenders did not even read the representations and instead relied on their own assessments of Arrium's financial position - appeals dismissed.

[View Decision](#) (I B)

## **Sullivan v Greig [2023] QSC 97**

Supreme Court of Queensland

Williams J

Succession - the deceased made a will one day before her death while suffering from terminal cancer, appointing a close friend her executor and leaving her entire estate to that friend - the friend renounced executorship - the deceased's daughter challenged the will on the bases that the deceased's signature on the will was a forgery, and that the deceased had lacked testamentary capacity at the time the will was executed - held: the friend had the onus of proving on the balance of probabilities that the deceased signed the purported will and that the deceased had testamentary capacity - a presumption arises that the purported will was signed by the deceased having testamentary capacity on the production of what appears on its face to be a regularly executed and rational testamentary instrument - that presumption arose in this case - the evidentiary burden thus shifted to the daughter to displace that presumption - given the seriousness of an allegation of forgery, the Court will assess the evidence accordingly, and a high standard of proof is required - both witnesses, who had no financial interest in the outcome of the case, gave evidence the deceased signed the will in their presence - the daughter presented no direct evidence disputing the authenticity of the signature - it was not unexpected that there would be some variation in the deceased's signature given the evidence about her state of health, including that she was experiencing some clumsiness of her hands - the deceased had signed the purported will - capacity is assessed on the four *Banks v Goodfellow* criteria, namely: (a) ability to understand that a will was being made; (b) ability to understand what her assets were; (c) ability to know who she should consider making provision for in her will; and (d) ability to weigh and evaluate claims on her estate - the testator had capacity under the *Banks v Goodfellow* criteria when she executed the will - in any event, the defendant would also have had capacity under the rule in *Re Spencer* [2015] 2 Qd R 435 that, where there is a decline in the mental condition of a testator between giving instructions for a will and the execution of the will, the critical date for assessing the *Banks v Goodfellow* criteria is the date of instructions, and the only capacity the testator needs at execution is the capacity to be satisfied that the will reflects whatever instructions he or she had given - the Court must also be satisfied that the deceased knew and approved of the contents of the will - the Court was so satisfied - the Court pronounced for the full force and validity of the will and ordered that letters of administration with the will annexed issue to the friend - parties to be heard on costs.

[Sullivan](#) (I B)

## **Hartland v Firm Construction Pty Ltd (in liq) [2023] WASC 147**

Supreme Court of Western Australia

McDonald AM

Insolvency - the plaintiff was employed as a carpenter/concreter, and attended a site in Applecross controlled and occupied by the defendant construction company - during a concrete pour, the plaintiff suffered concrete burns to his feet and legs following prolonged exposure to wet concrete - the defendant was later placed in liquidation - the plaintiff therefore required leave to sue for damages for personal injury - the plaintiff applied for such leave under s500(2) of the *Corporations Act 2001* (Cth) - held: part of the purpose of requiring leave is to avoid a company in liquidation being subject to a multiplicity of time-consuming and expensive actions - the discretion to grant or refuse leave is broad - there must be no prejudice to the creditors, or to the orderly winding up of the company - the Court should not grant leave if it appears there is no possibility that the company will be able to meet any part of any damages awarded, as the Court should not give its imprimatur to fruitless proceedings involving a waste of time and money - a strong factor in favour of leave is if there is an insurer standing behind the company that will pay any amount of the judgment - the claimant seeking leave need only establish a serious case to be tried - there was no direct evidence of the nature and extent of the plaintiff's injury at the commencement of proceedings except for the plaintiff's solicitors deposing that the plaintiff had sustained burns to his legs and feet, and Worksafe documents obtained under the *Freedom of Information Act 1992* (WA) that described the burns as serious, but which were redacted so as not to show the source of this information - the plaintiff's solicitors had since led further evidence - the plaintiff had established a serious question to be tried - there was no evidence any prospect of a surplus in the defendant's winding up - however, there was evidence of a relevant insurance policy, and that the insurer had been put on notice of the plaintiff's proposed claim - the Court could not determine on the evidence before it whether the insurer would ultimately respond to the claim - the Court accepted the suggestion by Counsel for the plaintiff that the Court grant leave to bring proceedings and also make an order that the plaintiff not execute on any judgment without further leave of the Court - such an order would provide a safety net for the defendant and its creditors, and the Court can revisit the issue of insurance if the plaintiff obtains judgment and seeks leave to enforce it - leave to bring proceedings granted on those terms.

[Hartland](#) (I B C)



## Poem for Friday

### ***Inferno Canto 26 - Ulysses' Last Voyage***

**from *The Divine Comedy --  
The Vision; or Hell,  
Purgatory, and Paradise,***

**By:** Dante Alighieri (1265-1321) - translated by Henry Wadsworth Longfellow

Rejoice, O Florence, since thou art so great,  
That over sea and land thou beatest thy wings,  
And throughout Hell thy name is spread abroad!

Among the thieves five citizens of thine  
Like these I found, whence shame comes unto me,  
And thou thereby to no great honour risest.

But if when morn is near our dreams are true,  
Feel shalt thou in a little time from now  
What Prato, if none other, craves for thee.

And if it now were, it were not too soon;  
Would that it were, seeing it needs must be,  
For 'twill aggrieve me more the more I age.

We went our way, and up along the stairs  
The bourns had made us to descend before,  
Remounted my Conductor and drew me.

And following the solitary path  
Among the rocks and ridges of the crag,  
The foot without the hand sped not at all.

Then sorrowed I, and sorrow now again,  
When I direct my mind to what I saw,  
And more my genius curb than I am wont,

That it may run not unless virtue guide it;  
So that if some good star, or better thing,  
Have given me good, I may myself not grudge it.





# Benchmark

As many as the hind (who on the hill  
Rests at the time when he who lights the world  
His countenance keeps least concealed from us,

While as the fly gives place unto the gnat)  
Seeth the glow-worms down along the valley,  
Perchance there where he ploughs and makes his vintage;

With flames as manifold resplendent all  
Was the eighth Bolgia, as I grew aware  
As soon as I was where the depth appeared.

And such as he who with the bears avenged him  
Beheld Elijah's chariot at departing,  
What time the steeds to heaven erect uprose,

For with his eye he could not follow it  
So as to see aught else than flame alone,  
Even as a little cloud ascending upward,

Thus each along the gorge of the intrenchment  
Was moving; for not one reveals the theft,  
And every flame a sinner steals away.

I stood upon the bridge uprisen to see,  
So that, if I had seized not on a rock,  
Down had I fallen without being pushed.

And the Leader, who beheld me so attent,  
Exclaimed: "Within the fires the spirits are;  
Each swathes himself with that wherewith he burns."

"My Master," I replied, "by hearing thee  
I am more sure; but I surmised already  
It might be so, and already wished to ask thee

Who is within that fire, which comes so cleft  
At top, it seems uprising from the pyre  
Where was Eteocles with his brother placed."

He answered me: "Within there are tormented  
Ulysses and Diomed, and thus together



They unto vengeance run as unto wrath.

And there within their flame do they lament  
The ambush of the horse, which made the door  
Whence issued forth the Romans' gentle seed;

Therein is wept the craft, for which being dead  
Deidamia still deplores Achilles,  
And pain for the Palladium there is borne."

"If they within those sparks possess the power  
To speak," I said, "thee, Master, much I pray,  
And re-pray, that the prayer be worth a thousand,

That thou make no denial of awaiting  
Until the horned flame shall hither come;  
Thou seest that with desire I lean towards it."

And he to me: "Worthy is thy entreaty  
Of much applause, and therefore I accept it;  
But take heed that thy tongue restrain itself.

Leave me to speak, because I have conceived  
That which thou wishest; for they might disdain  
Perchance, since they were Greeks, discourse of thine."

When now the flame had come unto that point,  
Where to my Leader it seemed time and place,  
After this fashion did I hear him speak:

"O ye, who are twofold within one fire,  
If I deserved of you, while I was living,  
If I deserved of you or much or little

When in the world I wrote the lofty verses,  
Do not move on, but one of you declare  
Whither, being lost, he went away to die."

Then of the antique flame the greater horn,  
Murmuring, began to wave itself about  
Even as a flame doth which the wind fatigues.



# Benchmark

Thereafterward, the summit to and fro  
Moving as if it were the tongue that spake,  
It uttered forth a voice, and said: "When I

From Circe had departed, who concealed me  
More than a year there near unto Gaeta,  
Or ever yet Aeneas named it so,

Nor fondness for my son, nor reverence  
For my old father, nor the due affection  
Which joyous should have made Penelope,

Could overcome within me the desire  
I had to be experienced of the world,  
And of the vice and virtue of mankind;

But I put forth on the high open sea  
With one sole ship, and that small company  
By which I never had deserted been.

Both of the shores I saw as far as Spain,  
Far as Morocco, and the isle of Sardes,  
And the others which that sea bathes round about.

I and my company were old and slow  
When at that narrow passage we arrived  
Where Hercules his landmarks set as signals,

That man no farther onward should adventure.  
On the right hand behind me left I Seville,  
And on the other already had left Ceuta.

'O brothers, who amid a hundred thousand  
Perils,' I said, 'have come unto the West,  
To this so inconsiderable vigil

Which is remaining of your senses still  
Be ye unwilling to deny the knowledge,  
Following the sun, of the unpeopled world.

Consider ye the seed from which ye sprang;  
Ye were not made to live like unto brutes,



But for pursuit of virtue and of knowledge.’

So eager did I render my companions,  
With this brief exhortation, for the voyage,  
That then I hardly could have held them back.

And having turned our stern unto the morning,  
We of the oars made wings for our mad flight,  
Evermore gaining on the larboard side.

Already all the stars of the other pole  
The night beheld, and ours so very low  
It did not rise above the ocean floor.

Five times rekindled and as many quenched  
Had been the splendour underneath the moon,  
Since we had entered into the deep pass,

When there appeared to us a mountain, dim  
From distance, and it seemed to me so high  
As I had never any one beheld.

Joyful were we, and soon it turned to weeping;  
For out of the new land a whirlwind rose,  
And smote upon the fore part of the ship.

Three times it made her whirl with all the waters,  
At the fourth time it made the stern uplift,  
And the prow downward go, as pleased Another,  
Until the sea above us closed again.”

**Dante Alighieri**, was born around 1265, in Florence, in the then Republic of Florence (now Italy). His mother died when he was 10 years old. He was an Italian poet, political activist, pharmacist, admitted to the Apothecaries’ Guild, and a philosopher. His political actions involved fighting in disputes, usually turning around the role of the Papacy, and between warring families. He became the prior of Florence in 1302. He was exiled from Florence for two years, from March 1302, but then after not paying the fine, condemned to be in perpetual exile. Had he entered Florence the punishment may have been burning at the stake. Dante wrote the *Divine Comedy* beginning at around the age of 35 years, which described his travels through Hell, Purgatory, and then to Paradise. The *Divine Comedy* is considered one of the most prominent works of the Middle Ages, and one of the works

that established the use of a type of modern Italian language, breaking away from the tradition to write only in Latin. His aim was that his poetry might be read by the common person. Dante died in Ravenna on 14 September 1321, aged 56, while still in exile.

[https://en.wikipedia.org/wiki/Dante\\_Alighieri](https://en.wikipedia.org/wiki/Dante_Alighieri)

**Dante's Inferno**, from the Divine Comedy, Silent film, 1911,

<https://www.youtube.com/watch?v=VszV6gEkgHk>

**Dante's Inferno Canto XXVI**, recited by Italian Actor and comedian **Roberto Benigni**,

<https://www.youtube.com/watch?v=UOkgT1iEp0A>

Roberto Benigni, won Oscars for Best Actor and Best Foreign Language Film at the 1999 Academy Awards for the movie *Life is Beautiful*.

<https://www.youtube.com/watch?v=8cTR6fk8frs> and

<https://www.youtube.com/watch?v=Ybgg4H4zTHo>

**Dr Brendan Case**, of the Harvard University Flourishing Project, speaks about **Canto 26 of Dante's Inferno**,

<https://www.youtube.com/watch?v=kys-6X2AkKk>

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