



Friday, 13 December 2024

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)

Commonwealth of Australia v Sanofi (HCA) - majority of the High Court considered the Court should not examine factual findings below, nor challenge concurrent findings of fact, where the appeal did not concern any individual rights, nor exposed any plain injustice, and the findings of the courts below were open and not clearly wrong (I B)

Caporaso Pty Ltd v Mercato Centrale Australia Pty Ltd (FCAFC) - trial judge had correctly dismissed a trade mark infringement claim, but should also have cancelled the registration of one of the trade marks said to have been infringed (I B)

New South Wales Aboriginal Land Council v Minister Administering the Crown Land Management Act 2016 (NSWCA) - Land and Environment Court had erred in finding that land claimed by Aboriginal Land Council was not 'claimable Crown lands' within the meaning of s36 of the *Aboriginal Land Rights Act 1983* (NSW) (I B)

In the matter of Mikcon Group Australia Pty Ltd (in liq) (NSWSC) - Court made orders enforcing guarantees and security a company director had given at the time the company became subject to a deed of company arrangement (I B)

Taringa Property Group Pty Ltd v Kenik Pty Ltd (QSC) - Court dismissed claim for judicial review of the decision of an administrator under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (I B C)

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Summaries With Link (Five Minute Read)

Commonwealth of Australia v Sanofi [2024] HCA 47

High Court of Australia

Gordon ACJ, Edelman, Steward, Jagot, & Beech-Jones JJ

Patents - respondent held a patent for drug listed on the Pharmaceutical Benefits Scheme (PBS) - Commonwealth subsidises drugs on the PBS, and pays a greater subsidy for patented drugs than generic drugs - in 2008, Sanofi obtained an injunction to prevent a generic version of its drug entering the Australian market, and undertook to compensate any person adversely affected by the injunction - its patent was later held invalid - the Commonwealth sought to rely on the undertaking to recover the increased subsidies it had paid due to the absence of the generic drug - Federal Court dismissed claim on basis Commonwealth had not shown the generic drug manufacturer would have sought to list the generic drug on the PBS and supply it in Australia - Full Court dismissed appeal on the same basis (see Benchmark 28 June 2023) - Commonwealth granted special leave to appeal to the High Court - held: (by Gordon ACJ, Edelman, & Steward JJ, Jagot J & Beech-Jones J dissenting in separate judgments) - contrary to the Commonwealth's submission, in an application for compensation pursuant to an undertaking given as the price of an injunction, once the applicant shows a prima facie case the injunction caused its loss, the evidential burden does not shift to the respondent - the Court should not interfere with the findings below that had led the Courts below to find the Commonwealth failed to discharge its burden - a second and ultimate appellant court should not undertake such a factual inquiry, nor challenge concurrent findings of fact, where, as in this case, the appeal does not concern any individual rights, nor expose any plain injustice, and the findings of both courts below were open and not clearly wrong - appeals to Australian intermediate appellate courts are typically appeals by way of rehearing, whereas appeals to the High Court are appeals in the strict sense - further, important aspects of the Commonwealth's counter-factual case involved allegations of error by the Full Court and the primary judge that were not part of its notice of appeal either to the High Court or the Full Court - Jagot and Beech-Jones LJ considered that the reasoning processes of both courts below involved clear error productive of plain injustice, demanding this Court's intervention and would have allowed the appeal - appeal dismissed.

[Commonwealth of Australia](#) (I B)

Caporaso Pty Ltd v Mercato Centrale Australia Pty Ltd [2024] FCAFC 156

Full Court of the Federal Court of Australia

Katzman, Wheelahan, & Hespe JJ

Trade marks - Caporaso operated an Italian-themed supermarket, restaurant, and wine retail business, and owned three trade marks incorporating MERCATO (meaning 'market'), a plain word mark, a fancy word mark, and a logo - Mercato Centrale operated a retail food services business under the name "Il Mercato Centrale" - Caporaso sued Mercato Centrale for trade mark infringement - Mercato Centrale denied infringement and cross-claimed for cancellation or narrowing of Caporaso's trade marks - the primary judge dismissed the infringement claims, and

upheld the cross-claim only by amending the description of services to which the plain word mark applied - Caporaso appealed and Mercato Centrale cross-appealed - held: the plain word mark should be cancelled under s62(b) of the *Trade Marks Act 1995* (Cth) as it had been registered on the basis of evidence or representations that were false in material particulars - contrary to what the primary judge held, the falsity of evidence or representations can be 'material' for the purposes of s62(b) if it induced the Registrar's to accept the trade mark application, and it is not necessary that the falsity relate to the registrability of the proposed trade mark - the primary judge did not err in finding no deceptive similarity between Caporaso's registered marks and Mercato Centrale's marks - appeal dismissed and cross-appeal allowed, and plain word trade mark cancelled.

[Caporaso Pty Ltd](#) (I B)

New South Wales Aboriginal Land Council v Minister Administering the Crown Land Management Act 2016 [2024] NSWCA 294

Court of Appeal of New South Wales

Adamson & Stern JJA, & Preston CJ of LEC

Indigenous land rights - private college offered to purchase Crown land it occupied, and relevant Minister accepted a recommendation the land be declared surplus to educational requirements and sold to the College on the terms offered - the NSW Aboriginal Land Council later made two claims over that land - respondent Minister refused claims on the basis the claimed land was not 'claimable Crown lands' within the meaning of s36 of the *Aboriginal Land Rights Act 1983* (NSW) - the Land and Environment Court agreed - Land Council appealed - held: the primary judge had appreciated the Minister had to prove the government had decided by the date of claim that the claimed land was required for an essential public purpose - however, the primary judge's reasons did not disclose findings of any decision to that effect, or that the government held a view or opinion to that effect, or the identification any person said to have made any relevant decision, or held any relevant view or opinion, or the time at which any relevant decision was made or opinion or view formed - the primary judge thereby failed to ask the correct question under s36(1)(c), which constituted an error of law - further, the primary judge's decision was legally unreasonable - the primary judge's conclusion that the sale to the College meant that that the government was only prepared to sell the land to the College because it provided education, and that it should therefore be inferred that the government needed the College to do so to fulfil an essential public purpose, not only did not follow but also lacked any rational basis in the evidence - appeal allowed.

[View Decision](#) (I B)

In the matter of Mikcon Group Australia Pty Ltd (in liq) [2024] NSWSC 1585

Supreme Court of New South Wales

Black J

Corporations law - a company became subject to a deed of company arrangement, and its sole director and two other companies associated with him executed a Deed of Guarantee and Indemnity guaranteeing the payments required under the DOCA and charging property as

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security - about half of the approximately \$2million the DOCA required to be paid was paid before payments ceased - the DOCA was terminated and the deed administrators appointed as liquidators - the liquidators sought to enforce the Deed of Guarantee and Indemnity against the director and the other two companies, seeking judgment for about \$1million plus interest, a declaration that the director's interest in the property was charged to secure the payment of those amounts, and an order appointing the liquidators as trustees for sale - held: reading the DOCA and the Deed of Guarantee and Indemnity together, the Deed of Guarantee and Indemnity, on its proper construction, created an obligation on the two companies associated with the director to pay the amounts required by the DOCA - further, the effect the Guarantee & Indemnity was to impose an obligation to pay interest on all of the guarantors in respect of any amount due and payable by any of them under the guarantee - the clause of the Deed of Guarantee and Indemnity that provided that the property was given as security provided that the security was also for the director's obligations under the DOCA - there was no real and sensible conflict of interest in appointing the liquidators as trustees for sale, as the liquidators and all other claimants on the sale proceeds had a common interest in maximising the sale price and minimising the sale costs, and the net sale proceeds would be paid into Court so that the Court and not the liquidators would determine completing claims - orders made as sought.

[View Decision](#) (I B)

Taringa Property Group Pty Ltd v Kenik Pty Ltd [2024] QSC 298

Supreme Court of Queensland

Hindman J

Security of payments - an adjudicator under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) ruled TPG pay Kenik about \$4.2million - TPG sought judicial review - held: the payment claim relied on was not invalid as not being made in relation to an available reference date - Kenik sent and TPG received a single demand for payment constituted by the final document being the payment claim - the adjudicator did not commit jurisdictional error in deciding that loans or advances made by TPG to Kenik and a payment made directly by a related party of TPG to Kenik were not to be included in the amount paid to date - the adjudicator did not fail to consider TPG's submissions and evidence that the payments were between the parties and would be repaid by being offset against future progress payments under the contract - the adjudicator did not materially deny procedural fairness to TPG by determining relevant issues on grounds not contended for and which TPG was not given an opportunity to address - adjudicator properly considered all necessary matters and accorded necessary level of procedural fairness to TPG on the issues and was not required to request further submissions - the adjudicator did not commit jurisdictional error by disregarding a limitation on her jurisdiction (that the claim had to arise under the contract) by determining that an entitlement to payment for additional work arose under s67(2) and s70 of the *Building Industry Fairness (Security of Payment) Act* on the basis that the work had been performed prior to termination, as the adjudicator found an entitlement to payment under the contract by reason of rights accrued prior to termination - TPG had not been materially denied procedural fairness by the manner in which the adjudicator determined the methodology and applicable percentage



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for the claims that were awarded as preliminaries in a particular variation claim - proceedings dismissed.

[Taringa Property Group Pty Ltd](#) (I B C)

Poem for Friday

The Lake Isle of Innisfree

By W. B. Yeats (1865-1939)

I will arise and go now, and go to Innisfree,
And a small cabin build there, of clay and wattles made;
Nine bean rows will I have there, a hive for the honey bee,
And live alone in the bee-loud glade.

And I shall have some peace there, for peace comes dropping slow,
Dropping from the veils of the morning to where the cricket sings;
There midnight 's all a-glimmer, and noon a purple glow,
And evening full of the linnet's wings.

I will arise and go now, for always night and day
I hear lake water lapping with low sounds by the shore;
While I stand on the roadway, or on the pavements gray,
I hear it in the deep heart's core.

William Butler Yeats was born on 13 June 1865, in Sandymount, Dublin, Ireland. His father was a lawyer and painter. He was an Irish poet, playwright and writer. WB Yeats was educated at home, then at the Godolphin School, and later at the Metropolitan School of Art in Dublin. He was thought to be dyslexic and deaf, with a love of biology and zoology. He had an interest in the occult and spiritualism. And was a member of The Ghost Club, a group which researched paranormal experiences. He was influenced by Hinduism and the Theosophical Lodge. Yeats was well known for his part in the Irish Literary Revival. He founded the Abbey Theatre, with Lady Gregory. He received the Nobel Prize in Literature in 1923. He died on 28 January 1939 at the Hotel Ideal Beausejour, in Roquebrune-Cap-Martin, France. The epitaph on his grave, taken from one of his last poems, "Under Ben Bulbin" reads, "Cast a cold Eye, On Life, on Death, Horseman, pass by!".

Anthony Hopkins recites Yeats, The Lake Isle of Innisfree

https://www.youtube.com/watch?v=INeq7Dakv_k

WB Yeats reads The Lake Isle of Innisfree

<https://www.youtube.com/watch?v=QLlcvQg9i6c>

Read by **Colin McPhillamy**, actor and playwright. Colin was born in London to Australian



parents. He trained at the Royal Central School of Speech and Drama in London. In the UK he worked in the West End, at the Royal National Theatre for five seasons, and extensively in British regional theatre. In the USA he has appeared on Broadway, Off-Broadway and at regional centres across the country. Colin has acted in Australia, China, New Zealand, and across Europe. Colin is married to Alan Conolly's cousin Patricia Conolly, the renowned actor and stage

actress: https://en.wikipedia.org/wiki/Patricia_Conolly and <https://trove.nla.gov.au/newspaper/article/47250992>.

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