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Benchmark

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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)

Hankuk Carbon Co, Ltd v Energy World Corporation Ltd (FCA) - the Court made orders under s8 of the *International Arbitration Act 1974* (Cth) for the recognition and enforcement of foreign arbitral awards (I B)

Burrows v The Ship 'Merlion' (FCA) - plaintiff had established Admiralty jurisdiction in most of the claims he sought to bring *in rem* against a ship (B C I)

Crawford v State of Western Australia (FCA) - statutory provisions empowering the President of the Children's Court to direct a Children's Court magistrate holding a concurrent appointment as a Magistrates Court magistrate to work a particular amount of time in the Magistrates Court were not constitutionally invalid as being a threat to judicial independence (B I)

Kitoko v Sydney Local Health District (NSWCA) - leave refused to appeal from summary dismissal of proceedings (I B)

Pastor v Aegis Aged Care Staff Pty Ltd [No 4] (WASCA) - primary judge had correctly refused an extension of time to commence defamation proceedings, where there was no evidence that it was objectively not reasonable in the circumstances to have commenced within time (I)

HABEAS CANEM

Expectant

Summaries With Link (Five Minute Read)

Hankuk Carbon Co, Ltd v Energy World Corporation Ltd [2024] FCA 232
Federal Court of Australia
Stewart J
Arbitration - Hankuk Carbon, a company incorporated in the Republic of Korea, as seller, entered into a contract with Energy World Corporation, an Australian registered company listed on the ASX, as buyer, for the supply and delivery of goods, including insulation panels and stainless steel membranes to be used in the building of an LNG storage tank in the Philippines - the contract included a term that all disputes, controversies, or differences between the parties in relation to the contract or for its breach would be finally settled by arbitration - a dispute arose regarding non-payment for completed shipments under the contract, and failure to accept goods delivered under the contract - Hankook Carbon commenced arbitral proceedings in Hong Kong - it obtained two arbitral awards, a merits award and a costs award - Hankuk Carbon sought orders under s8 of the *International Arbitration Act 1974* (Cth) for the recognition and enforcement of these awards - held: the Court was satisfied that Hankuk Carbon and Energy World Corporation were parties to the arbitration agreement, that the arbitration was convened pursuant to that agreement, and that Hankuk Carbon and Energy World Corporation were the parties to the merits award and the costs award - Energy World Corporation brought proceedings at the seat of the arbitration, Hong Kong, to set aside the awards, but was unsuccessful; and was denied leave to appeal - the awards were final in the sense that they were no longer subject to any revision or variation by the Tribunal, and they were also no longer subject to recourse at the seat - Hankuk Carbon sought a two-stage form of order with a a process of entering judgment and then staying that judgment to give Energy World Corporation the opportunity to apply to set it aside - this was slightly different from the form of orders more commonly made in the Federal Court - there was precedent for this form of orders in Victoria, England and Wales, and Hong Kong - the Court was satisfied that such form of orders was appropriate where the award creditor has not been notified by an award debtor of an intention to object to enforcement of the award with particulars of the basis or bases for that position, the award creditor is not otherwise aware of any reasonably arguable basis upon which the award debtor may object, and the award debtor has unsuccessfully exhausted its options of setting aside the award at the seat - orders made as sought.
Hankuk Carbon Co, Ltd (I B)

Burrows v The Ship 'Merlion' [2024] FCA 220
Federal Court of Australia
Sarah C Derrington J
Admiralty law - the plaintiff claimed to be the owner of a ship, The Merlion, which he contracted to trade-in for a new vessel to be built by PMY - after taking possession of The Merlion, PMY went into liquidation - the plaintiff terminated the contract - the sole director of PMY purported to transfer ownership in The Merlion to Thurlow, who kept it moored at his private jetty - the plaintiff commenced proceedings *in rem* against The Merlion, seeking a declaration that he was

the sole beneficial owner, an injunction requiring Thurlow to give possession or transfer title, and damages for conversion, detinue, and under the *Australian Consumer Law* - the plaintiff asserted Admiralty jurisdiction in that each of his claims was a proprietary maritime claim concerning a ship that founded an action *in rem* under s16 of the *Admiralty Act 1988* (Cth) - the Admiralty Marshal arrested The Merlion pursuant to an arrest warrant taken out by the plaintiff - Thurlow contested jurisdiction and also sought summary dismissal even if jurisdiction were established - held: a "proprietary maritime claim" is defined by s4(2) of the *Admiralty Act* - such jurisdiction does not depend on any factual precondition, but rather on the claim having the legal character of a claim relating to possession of or title to, or ownership of, a ship - claims that The Merlion was held on trust, for knowing receipt under *Barnes v Addy*, and for an alleged sham, were proprietary maritime claims - claim under the *Australian Consumer Law*, based on a series of alleged misleading or deceptive pre-contractual and contractual representations in respect of PMY's capacity, was not a proprietary maritime claim, and should be struck out as impermissibly commenced in the same proceedings as the *in rem* claims, contrary to r18 of the *Admiralty Rules* - the plaintiff had a reasonable prospect of establishing the trust claim, the *Barnes v Addy* claim, and liability in conversion or detinue - he had no reasonable prospect of establishing the sham claim, which should be struck out - the prayer that the Admiralty Marshal provide the plaintiff with possession was entirely misconceived, as the Merlion was not in the Marshal's possession, but was rather in the Marshal's custody, and possession remained with whoever was lawfully entitled to it - further the plaintiff had had The Merlion arrested and had caused her to be in the Marshal's custody, and, should he wish The Merlion to be released from arrest, the relevant procedure was provided for in the *Admiralty Rules*.
Burrows (B C I)

Crawford v State of Western Australia [2024] FCA 222
Federal Court of Australia
Perram J
Constitutional law - the applicant was appointed a magistrate of the Magistrates Court of WA and as a magistrate of the Children's Court of WA - after a workload review, the President of the Children's court issued a direction to the applicant under s11 of the *Children's Court Act of Western Australia 1988* (WA) that she work one day per week in the Children's Court and four days per week in the Magistrates Court - the president then issued a further direction under s11 that had the effect that the application would work full time in the Magistrates Court - the applicant commenced proceedings, challenging the constitutional validity of s11 and s12A of the *Children's Court Act of Western Australia* and certain other provisions on the basis that they undermined the independence of the magistrates of the Children's Court - held: although the separation of powers has no direct application to the judiciaries of the States, the courts of the States are invested with federal jurisdiction by s39(2) of the *Judiciary Act 1903* (Cth) and the High Court has held that the vesting of a function in the court of a State which has the capacity to undermine public confidence in the impartiality of the courts which exercise federal jurisdiction is inconsistent with Chapter III of the Constitution and invalid - after analysis, the Court agreed with the parties that s11 and s12A, on their proper construction, purported to

empower the President to issue the notices he had issued to the applicant - there was no doubt that the provisions could not be used for the improper purpose of sidelining a magistrate from sitting altogether - they also could not be used to achieve this result even innocently - the Court therefore read the provisions so that the Chief Magistrate can only allocate work to the magistrate in the Magistrates Court in such a way that the basis upon which the magistrate works, considered across both courts, is not altered, unless the magistrate consents - the provisions were concerned only with the efficient allocation of the resource of dually appointed magistrates, and on their proper construction did not authorise transfer of a magistrate from the Children's Court to the Magistrates Court because of concerns about competence or behaviour - there was nothing objectionable about the powers conferred on the President by the relevant provisions - it is well established that the power of a presiding officer legitimately extends to the efficient allocation of judicial resources - the provisions, on their own, did not pose any threat to judicial independence - application dismissed.
Crawford (B I)

Kitoko v Sydney Local Health District [2024] NSWCA 49
Court of Appeal of New South Wales
Ward P & Gleeson JA
Medical negligence - the plaintiff sued the defendants, alleging medical negligence and conspiracy at St George Public Hospital - the defendants sought summary dismissal on the ground that the proceedings were incapable of being substantiated by evidence, and were frivolous, vexatious, and an abuse of process, or alternatively that the plaintiff's pleading be struck our , or that the claim be permanently stayed as an abuse of process - the plaintiff claimed entry of judgment under r13.1 of the *Uniform Civil Procedure Rules 2005* (NSW), for damages to be assessed, on the basis that the defendants had no defence except as to quantum, or alternatively the entry of default judgment for damages to be assessed under r16.3(1)(a) on the ground that no defence had been filed - the plaintiff also sought leave to file a further amended statement of claim pleading additional causes of action including misleading and deceptive conduct and unconscionable conduct - the primary judge summarily dismissed the proceedings under r13.4 of the UCPR (see Benchmark 9 August 2023) - the appellant sought leave to appeal the summary dismissal, and the dismissal of his application for summary dismissal and leave to file a further amended statement of claim - held: the applicant had to establish that the proposed appeal raised issues of principle or questions of public importance; and that there was an arguable case that error had occurred that occasioned him an injustice - where he complained about the exercise of a discretion, such as, for example, the refusal of leave to file an amended statement of claim, then he had to show *House v The King* error - the applicant's contention that the primary judge was exercising federal jurisdiction when determining the interlocutory applications before him had no prospects of success - the applicant had not identified any arguable case that there was an error in the refusal to grant summary judgment in his favour - the applicant's contentions that the primary judge acted on a wrong principle in failing to give adequate reasons to refuse the application to file amended pleadings, and failed to afford procedural fairness, had no prospects of success - a careful

review of the transcript showed that the primary judge sought the applicant's response on a number of points and invited submissions from him on his applications, and there was nothing on the transcript to support the assertion of intimidation or bullying - the prospects of success on appeal were so low as not to warrant any grant of leave.
View Decision (I B)

Pastor v Aegis Aged Care Staff Pty Ltd [No 4] [2024] WASCA 24
Court of Appeal of Western Australia
Mitchell, Hall, & Vandogen JJA
Defamation - Pastor and Mann were both employed by Aegis Care Staff at an aged care facility - Pastor claimed that Mann said to Pastor that she (Mann) had heard Pastor say that she (Pastor) hated working with Africans and could not stand them, in the hearing of a third Aegis Care Staff employee - Pastor alleged that the statement conveyed the defamatory imputation that Pastor is a racist, segregationist, and white supremacist - Pastor also alleged that Mann's statement was repeated by a fourth Aegis Staff employee to further Aegis Staff employees - Pastor sought to sue Mann as the original publisher and Aegis Care Staff as being vicariously liable - the Principle Registrar of the District Court refused an extension of time under s40 of the *Limitation Act 2005* (WA) for leave to commence the action after one year; and granted summary judgment to the respondents on the basis that the action was clearly statute barred - the primary judge in the District Court confirmed these orders on appeal - Paster appealed to the Court of Appeal - held: limitation legislation, and the defences provided by limitation legislation, operate by reference to the commencement of proceedings in relation to a cause of action, and not by reference to subsequent steps in the course of proceedings, unless that subsequent step is seen as the "commencement" of a proceeding by the addition of a new cause of action - the substitution of one company for another as the employing company being sued did not introduce any new cause of action - Pastor had always intended to sue the employer of herself and Mann, but had merely been mistaken as to the name of the entity who answered that description - the only reason Pastor required an extension of time was the failure of the indorsement on the original writ, either considered alone or in context of any previous correspondence in evidence, to identify, even deficiently, any cause of action - the amendment to the indorsement that had been permitted had introduced a new cause of action relating to the publication of defamatory matter, and this had occurred more than one year after the alleged publication - there was no evidence capable of satisfying the primary judge that it was objectively not reasonable in the circumstances for Pastor to have commenced an action relating to defamatory statements within one year from the publication - appeal dismissed.
Pastor (I)

Poem for Friday

Near Avalon

By: William Morris (1834-1896)

A ship with shields before the sun,
Six maidens round the mast,
A red-gold crown on every one,
A green gown on the last.

The fluttering green banners there
Are wrought with ladies' heads most fair,
And a portraiture of Guenevere
The middle of each sail doth bear.

A ship with sails before the wind,
And round the helm six knights,
Their heaumes are on, whereby, half blind,
They pass by many sights.

The tatter'd scarlet banners there
Right soon will leave the spear-heads bare.
Those six knights sorrowfully bear
In all their heaumes some yellow hair.

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