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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)

Primary Securities Ltd as Trustee of the Baker Partners Founders Fund v Warburton (FCA) - Court gave judicial advice to a trustee that it would be justified in maintaining proceedings against certain respondents, discontinuing against others, and commencing proceedings against a new respondent (I B)

Broadspectrum (Australia) Pty Ltd v Farmer (NSWCA) - worker who fell down stairs at the Commonwealth's Regional Processing Centre in Nauru succeeded in negligence against his employer and the contractor responsible for maintenance at the Centre (I B C)

Bega Valley Shire Council v Kenpass Pty Ltd (NSWSC) - adjudicator under the *Building and Construction Industry Security of Payment Act 1999* (NSW) had not fallen into jurisdictional error in finding that Council's payment schedule had not adequately stated reasons for withholding payment (I B C)

Hove v University of Western Australia (WASCA) - University prevented dental student from re-enrolling in units after the Health Service excluded him from clinical placement - judicial review application successful against University and unsuccessful against Health Service, but the Court noted the Health Service may find it prudent to afford procedural fairness when deciding whether to maintain its exclusion (I B)

Yole and Ors v Tasracing Pty Ltd (TASSC) - warning-off notices issued by Tasracing to four

licenced persons found by a report to have engaged in misconduct were valid (I B)

HABEAS CANEM

Stick triptych

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Summaries With Link (Five Minute Read)

Primary Securities Ltd as Trustee of the Baker Partners Founders Fund v Warburton [2024] FCA 382
Federal Court of Australia
Jackson J
Corporations law - PSL was trustee of the BPF Fund, which was designed to be a vehicle by which wholesale investors could make certain kinds of investments - it was also the responsible entity for a different fund which was structured as a managed investment scheme under Chapter 5C of the *Corporations Act 2001* (Cth), known as the Primary Investment Board - certain subscribers ended up holding an interest in the BPF Fund through a different trustee - PSL contended that, as a result of contractual arrangements and transactions with one Warburton and his related entities, it lost about $4million on an investment of about $8.5million in a Cayman Island fund associated with Warburton - it commenced proceedings against a number of respondents - by an interlocutory application, it sought judicial directions under s92(1) of the *Trustees Act 1962* (WA) that it would be justified and acting properly in: (1) maintaining this proceeding and prosecuting its claims against the third, fourth, sixth and seventh respondents; (2) discontinuing its claims against the second and fifth respondents; and (3) commencing a claim against a party that was not yet a respondent - held: there are no express or implied limitations on the power to give judicial advice which prevent it being exercised in relation to certain kinds of proceedings - the only jurisdictional bar is that the applicant must point to the existence of a question respecting the management or administration of the trust property, or the interpretation of the trust instrument - the practice of the Court has been to look for, and in appropriate cases, rely upon, a memorandum of opinion from counsel - such an opinion is not mandatory and is not necessary in every application, but it may have practical importance - the function of obtaining counsel's opinion is not necessarily to establish that a proceeding has reasonable prospects of success, but to show that the trustee has taken reasonable steps to investigate and consider the matter properly, including, where appropriate, by obtaining counsel's opinion - courts have consistently warned against applications for judicial advice being used as a way of obtaining an endorsement of a business judgement - PSL had advice from senior counsel that the relevant claims had reasonably good prospects of success and should be pursued, and that other claims were foredoomed to fail and should be discontinued - directions made as sought by PSL.
Primary Securities Ltd as Trustee of the Baker Partners Founders Fund (I B)

Broadspectrum (Australia) Pty Ltd v Farmer [2024] NSWCA 81
Court of Appeal of New South Wales
Mitchelmore JA, Basten, & Griffiths AJJA
Negligence - Farmer was employed as a Safety and Security Advisor with Wilson Security at the Commonwealth's Regional Processing Centre in Nauru - Broadspectrum was responsible for inspecting, maintaining, and performing repair works at the Centre - Farmer was injured when he fell down a flight of stairs when he left his accommodation at the Centre to commence his

shift, after he tripped on an exposed steel capping on the edge of the top platform of the flight of stairs - he sued both Wilson and Broadspectrum in negligence - the primary judge gave judgment for Farmer against both defendants - the defendants appealed - held: the alleged error in the primary judge's factual finding concerning the height of the lip in the aluminium frame, even it were an error, was not material - although the primary judge appears to make a finding that the height of the lip was 6.25mm, this did not form part of the primary judge's central reasoning regarding the cause of Farmer's fall - the primary judge had accepted Farmer's evidence, and concluded from the expert evidence that the cause of the injuries was the presence of the raised lip which impeded Farmer's progress when his heel became caught on the raised lip, and that this constituted an obstruction which was sufficient to amount to a safety hazard - the primary judge's reasoning and the factual findings which underpinned it were correct and no appellable error had been demonstrated - the Court would be reluctant to interfere with the primary judge's unqualified acceptance of Farmer's evidence, having regard to the advantage enjoyed by the primary judge - in the insurance claim form completed by Farmer shortly after the accident he said that he believed that he had slipped on a pool of water at the top of the stairs as opposed to having tripped, and, when challenged on this, Mr Farmer said that his evidence had "perhaps not changed" but that he had "more of a recollection of what happened" - given the nature of Farmer's injuries and the evidence that his injuries caused him considerable pain, the primary judge was justified in not attaching any particular significance to the different, earlier version given by Farmer - the primary judge had not erred by not accepting the appellants' contention that falls down stairs for unexplained reasons are common - the Court was satisfied that the primary judge had an actual persuasion that the injuries were sustained in the manner described by Farmer, and, after factoring in the primary judge's advantage in observing Farmer give his evidence, then Court would arrive at the same conclusion - regarding the expert evidence as to whether there had been a breach of duty of care, due to the significance of the raised lip and absence of a yellow non-slip strip, this was "one of those situations where the opinion can be as faithfully and earnestly given as one likes, but where the fact and the view of those on the spot are different, the opinion from the academic would yield" - appeal dismissed.
View Decision (I B C)

Bega Valley Shire Council v Kenpass Pty Ltd [2024] NSWSC 399
Supreme Court of New South Wales
Nixon J
Security of payments - Council entered into a contract with Kenpass for the demolition of the existing bridge over Whipstick Creek in Wyndham, and the construction of a concrete road bridge - Kenpass served a payment claim on the Council pursuant to s 13 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) for about of $2.5million, including an amount of about $900,000 for delay damages in respect of "Sidetrack Design and Agreement" - Council served a payment schedule in response stating a negative amount payable - Kenpass applied for an adjudication, and the adjudicator issued a determination in favour of Kenpass, which relevantly included the claimed amount for delay damages - Council sought judicial

review of the determination - held: although adjudication determinations should not be viewed through the prism of legal concepts or examined with a fine-tooth comb, the adjudicator was obliged to afford the parties procedural fairness and, to stand, the determination must reveal an evident and intelligible justification - there was an evident and intelligible justification for the adjudicator's conclusion that Council's reasons set out in the payment schedule were not "valid" reasons, namely, that they did not comply with the minimum content for a reason for withholding payment as set out in the relevant authorities - any error by the adjudicator in interpreting s14(3), or in understanding and applying the reasoning in the relevant authorities, was not jurisdictional error - whether a payment schedule provides only "vague, generalised objections to payment" or whether it "sufficiently describe[s] the dispute so as to enable the claimant to determine whether to proceed in the knowledge of the nature of the case it will have to meet" are questions of degree on which minds may reasonably differ - no jurisdictional error had been established in respect of the failure to refer to statements made in the Superintendent's Assessment which was attached to the payment schedule - the relevance of the Superintendent's Assessment to the dispute before the adjudicator was unexplained, and such relevance may not have been immediately apparent to the adjudicator - in circumstances where the adjudicator had determined that the payment schedule did not include "reasons for withholding payment" within the meaning of s14(3), it necessarily followed that any reasons for disputing quantum which were given in the adjudication response were "new reasons for withholding payment" - the adjudicator had therefore not erred in so finding - it is consistent with this legislative intention that if a payment claim is made, and the adjudicator finds that the respondent does not advance in the payment schedule any valid reason for withholding payment, the adjudicator can "then and without more" determine the amount of the progress payment based on the payment claim, without independently examining and being satisfied as to the contractual basis for the claim, the merits of the claim, the proof of loss, or the quantification of damage - to the extent that there is an issue about any of those matters, the Act defers the final determination of contractual rights to a different forum, in which the consequences of any erroneous determination can and must be taken into account - proceedings dismissed.
View Decision (I B C)

Hove v University of Western Australia [2024] WASCA 37
Supreme Court of Western Australia
Buss P, Mitchell, & Vandongen JJA
Administrative law - the appellant was enrolled in a Doctor of Dental Medicine course at the University of Western Australia - he failed the last two units to complete the course, involving a clinical placement program at the Dental Health Service operated by the North Metropolitan Health Service - the DHS stated it would not consider permitting the appellant to participate in future clinical rotations because it was concerned his clinical ability and patient safety - the University did not permit the appellant to re-enrol in the required units - the appellant sought judicial review of the decisions of the Health Service and the University - the primary judge dismissed this application - the appellant appealed - held: s78 of the *University of Western*

Australia Statute made under the *University of Western Australia Act 1911* (WA) required the appellant's enrolment to be conducted in accordance with the University Legislation, including rules and policies made by the University - there is nothing in the University Legislation that provided for the appellant to be excluded from enrolment in the units by a decision of the Academic Board on the basis of advice from the Health Service - this was a material error of law in making the decision to exclude the appellant from enrolment in those units, which, in the case of a non-curial body such as the University, was jurisdictional error - further, the primary judge had erred in finding that the actions of the University did not amount to a decision which was capable of being reviewed - the primary judge had focussed on a decision about whether the appellant should be permitted to attend or undertake further clinical placements, rather that the decision actually made by the University, which was that the appellant was not allowed to enrol in the relevant units - regarding the Health Service's decision, it was reasonably arguable that the exclusion of the appellant, once he was enrolled in a unit with a clinical placement component, would involve the exercise of the Health Service's statutory functions under s34(1)(a) and (b) of the *Health Services Act 2016* (WA), and that the exercise those functions for the purpose of protecting patients might also attract an obligation to accord procedural fairness before making a decision which would adversely affect a student's interests - however, this argument, which had some novelty and raised some difficult issues, should be determined in a case where its resolution was critical to the outcome of the appeal - the Court suggested that, if the appellant were re-enrolled by the University, and the Health Service then had to decide whether to maintain its exclusion, the Health Service might consider it prudent to afford procedural fairness to the appellant by informing him of the basis of any continuing concern about his clinical ability and resultant patient safety, and providing him with a reasonable opportunity to address that concern, before making a final decision - appeal allowed in respect of the University's decision, and that decision set aside, and appeal dismissed in respect of the Health Service's decision.
Hove (I B)

Yole and Ors v Tasracing Pty Ltd [2024] TASSC 17
Supreme Court of Tasmania
Pearce J
Administrative law - following an investigation into animal welfare and allegations of team driving and race fixing in harness racing, Tasracing asked four licenced persons to show cause why it should not issue each of them with a warning-off notice under s54(2)(a) of the *Racing Regulation Act 2004* (Tas), directing each of them not to enter any of the seven Tasmanian racecourses controlled by Tasracing for a period of 28 days - the recipients commenced proceedings in the Supreme Court - the Court made an interlocutory injunction restraining the issue of the notices until further order, and issued a general order to show cause why the issue of the notices should not be permanently restrained - held: s54(2) gives Tasracing express power to issue a warning-off notice - the Court was not persuaded that the text, context, or purpose of the *Racing Regulation Act* was such as to require the express terms of s54 to be read down to limit the power of Tasracing so as to exclude matters concerning the "integrity" of

the conduct of racing and allegations of breach of the Rules of Racing, so that such matters would fall exclusively within the power of the Director and the stewards - if it were necessary to tie the exercise of the power to the general functions and powers of Tasracing, the Court noted that there could hardly be a factor more important to the development, promotion, and viability of racing as a commercial undertaking than public confidence that it is conducted with honesty and propriety and with utmost regard to the welfare of the animals which participate in racing - the Court was not satisfied that the actuating reason for Tasracing's decision was outside the scope of the purpose of the legislation - Tasracing's decision was not unreasonable, as it had acted on a report prepared by a highly experienced person after extensive investigations which, subject to certain qualifications, determined that each recipient of a notice had committed the conduct detailed in the report on which the proposed notices were based - Tasracing had not failed to afford procedural fairness to the recipients of the notices - originating application dismissed and the general order to show cause and the interlocutory injunction discharged. Yole and Ors (I B)

Poem for Friday

Scatterbrain and The Shipwreck

By: E. H. Visiak (1878-1972)

Scatterbrain

He goes wool-gathering ‘neath the stars;
He hath a screw loose: *Scatterbrain.*
He hath a window loose that jars
Open to heaven, and falls shut again.

The Shipwreck

She lies in primal darkness crushed and frore,
Ground in the mill of the ocean’s threshing-floor;
And monstrous fish, with phosphorescent eyes,
Explore a ruined city fallen from the skies.

E. H. Visiak was the pseudonym of Edward Harold Physick. In his lifetime, he was primarily known as the editor of the Nonesuch Press edition of Milton’s works, however his posthumous fame is almost entirely due to his visionary novel *Medusa* (1929) and for his friendship with the fantasy writer David Lindsay, author of *Voyage to Arcturus.* Visiak was born in London on 20 July 1878 and worked in variety of jobs in London and Manchester. In WW1 he was a conscientious objector. Prior to that, he had begun publishing poetry in magazines such as *The New Age* and *Freewoman,* alongside writers such as Ezra Pound, Rebecca West, Hillaire Bellloc, H.G. Wells and G.K. Chesterton, and published several slim books of poetry, including *Buccaneer Ballads* (1910) and *The Phantom Ship* (1912), which, as the titles suggest, often concerned pirates and supernatural occurrences, with a pronounced taste for the macabre. In addition to *Medusa,* he also wrote what would now be considered a Young Adult novel, *The Haunted Island* (1910) and *The Shadow* (1936). He was also a highly respected scholar of Milton and in addition to editing his work, wrote several studies, as well as a study of the author Joseph Conrad. In later life he settled in Hove, and his final work was an evocation of his childhood, *Life’s Morning Hour* (1969). He died on 30 August 1972, at the age of 94.

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