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Friday, 20 October 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)

Vehicle Monitoring Systems Pty Limited v SARB Management Group Pty Ltd trading as Database Consultants Australia (No 10) (FCA) - patents - Court continued stay of injunctions and costs orders until the resolution of an appeal from its judgment (I B)

Salmon v Albarran (NSWSC) - Court dismissed breach of fiduciary duty and related claims against receivers and a solicitor, arising out of litigation in 2006 (I B)

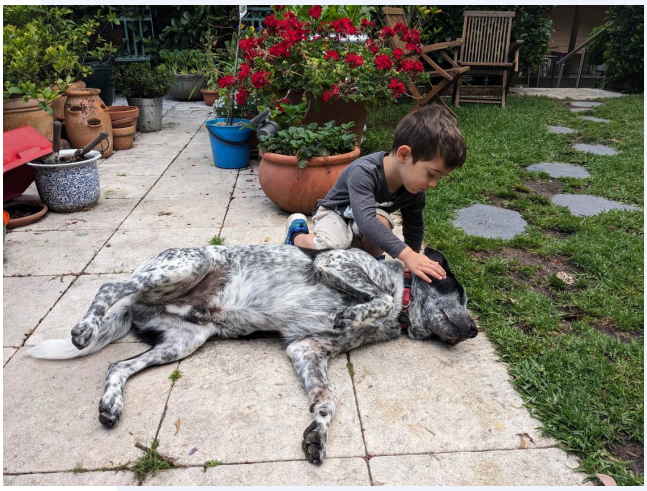
Icon Energy Limited v Chief Executive, Department of Resources (QSC) - delegate of the Chief Executive, Department of Resources, fell into jurisdictional error when he refused to accept an application for renewal of an authority to prospect under the *Petroleum and Gas (Production and Safety) Act 2004* (Qld) (I B C)

Reger & Hanney (FedCFamC1F) - Court had jurisdiction in respect of an infant that had been taken to the USA, as the infant was habitually resident in Australia - Court ordered the immediate return of the infant to NSW (I B)

CJ v Secretary of the Department for Education, Children and Young People (TASFC) - primary judge had correctly dismissed appeal from the decision of a magistrate refusing to revoke a decision to giving custody of the appellant's daughter to the Secretary of the Department (I B)

HABEAS CANEM

Mcgregor's favourite activity



AR Conolly & Company Lawyers
Level 29 Chifley Tower, 2 Chifley Square, Sydney NSW 2000
Phone: 02 9159 0777 Fax: 02 9159 0778
ww.arconolly.com.au

Summaries With Link (Five Minute Read)

Vehicle Monitoring Systems Pty Limited v SARB Management Group Pty Ltd trading as Database Consultants Australia (No 10) [2023] FCA 1214
Federal Court of Australia
Besanko J
Patents - Vehicle Monitoring Systems was the registered owner of two patents for an invention that identified the overstay of a vehicle in a parking space - the invention involved a battery-powered subterraneous detection apparatus (DA) to detect the presence of a vehicle in a parking space, the storage of data in the DA, and the wireless transmission of that data to a data collection apparatus (DCA), and the indication by the DCA to an operator of overstaying vehicles - Vehicle Monitoring Systems sued SARB, who supplied a similar system, for infringement of the patents - SARB cross claimed seeking revocation of the patents - the Court held that SARB had infringed certain claims of Vehicle Monitoring System's patents, and a claim for additional damages was available in some respects, and dismissed the cross claim(see Benchmark 23 June 2023) - the Court later made orders, but stayed certain orders, including as to injunctions and costs - SARB now sought that the stay of those orders be extended to the hearing (listed in November 2023) and determination of its appeal - held: the issue of whether a stay should be granted had been far from straightforward, with a long and complex history related to the details attending the sale of a business and the sale of shares - SARB had eventually produced unredacted copies of the relevant agreements after it had failed to set aside a notice to produce - SARB's appeal was limited to whether the patents were invalid because they failed to describe the best method of performing the invention, and a single question of construction regarding whether the relevant claims applied in a certain respect - a successful party is presumed to be entitled to the benefits of the judgment obtained, and an applicant for a stay has the burden of persuading the court that it should be granted - however, the Court in the exercise of its discretion will not hesitate to stay proceedings when it is necessary to preserve the subject matter or the integrity of the litigation, or where the refusal of a stay could present practical difficulties regarding the relief which the Court could grant - Vehicle Monitoring Systems had not offered an undertaking as to damages, which was a relevant consideration in favour of a stay - the question of a continuation of the stay was finely balanced - given the sale documents that had recently been produced in unredacted form, it was no longer true to say that absent a stay, a business would be shut down, and it was not obvious to the Court that SARB and its counterparty could not have fully disclosed the position earlier, which counted against a stay - however, the appeal would be heard shortly and was genuine, based on reasonable grounds, and confined to fairly concise points - on balance, the Court considered it should grant the stay sought - the Court also made an order confidentiality orders over an annexure to an affidavit filed by SARB, as the relevant officer of Vehicle Monitoring Systems would not need to see that annexure until the second stage of the first instance proceedings regarding quantum, which would not occur until after the forthcoming appeal.
Vehicle Monitoring Systems Pty Limited (I B)

Salmon v Albarran [2023] NSWSC 1238
Supreme Court of New South Wales
Nixon J
Fiduciary duties - in 2006, TCBS appointed Albarran and McDonald as receivers of two related companies, pursuant to charges those companies had given - a liquidator had also been appointed to those companies - the liquidator commenced proceedings against TCBS and the receivers, alleging the charges and appointment of receivers were invalid - the parties agreed to settle in principle, subject to execution of a settlement deed - the receivers, through their solicitor, insisted that the deed include a release in respect of money paid to them by the deed administrator of another company - the liquidator would not agree to this - the litigation continued, and Young CJ in Eq found that the one charge invalid and the other valid, and awarded the liquidator 80% of his costs - TCBS was unable to pay the costs order and was wound up, and Salmon, who owned all the shares in TCBS went bankrupt - after Salmon was discharged from bankruptcy in 2014, he re-registered TCBS and caused TCBS to assign all its choses in action to him and another company he controlled - Salmon and that company then sued the receivers and their solicitor, alleging that: (1) the solicitor had dishonestly breached fiduciary duties to TCBS, by continuing to act in a position of conflict and pursuing a benefit for himself and the receivers, (2) Albarran had breached fiduciary duties to TCBS by continuing to act in a position of conflict and pursuing a benefit for himself, the other receiver, and the solicitor, and that the solicitor knowingly assisted in that breach; and (3) both receivers breached their duties under their appointment documents, which were said to be deeds - the solicitor disputed that he had acted as solicitor for TCBS, and said he had been retained only by the receivers - held: the fiduciary duty owed by a solicitor to a client is a duty of absolute and disinterested loyalty, and that this embodies two themes: the conflict rule and the profit rule - a formal retainer is not necessary for fiduciary obligations to be imposed on solicitors - a retainer does not need to be express, but may be implied from the contemporaneous documentation - when both parties to a transaction consult the same solicitor and together give him the information needed to prepare the documents in which their respective rights and obligations are to be set out, and the solicitor accepts responsibility to prepare the documents without any indication that he cannot fully discharge his professional duties to them both, there is a strong bias towards finding that the solicitor tacitly agrees to act for both parties and to undertake the usual professional responsibilities to them both - the solicitor had been retained to act for TCBS in the 2006 proceedings - after considering the authorities, the Court concluded that a receiver is not in a position of divided loyalty, balancing the interests of the appointor with the interests of the company - rather, the receiver must act in the best interests of the appointor - the receiver is in a fiduciary relationship only with the appointor - informed consent is a defence, in that there is no duty on a fiduciary to obtain informed consent, but rather the existence of informed consent will go to negate what would otherwise be a breach of duty - it is for the fiduciary to prove informed consent - the consent must be "fully informed", and what is required is a question of fact in all the circumstances of each case - the Court found TCBS gave fully informed consent to the solicitor continuing to act in the 2006 proceedings after the release from liability issue was

raised - the claim for breach of fiduciary duty against the solicitor and Albarran, based on each continuing to act after the release from liability issue was raised, was rejected - Salmon had not established that the solicitor dishonestly breached fiduciary duties by inserting the liability release into the draft settlement deed - all claims for knowing assistance were also rejected - the receiver's appointment documents took effect as contracts and not deeds - therefore, all claims for breach of those documents were statute-barred - in any event, the receivers had not breached those documents - plaintiffs' claims dismissed.
View Decision (I B)

Icon Energy Limited v Chief Executive, Department of Resources [2023] QSC 227
Supreme Court of Queensland
Brown J
Administrative law - Icon is a Queensland-based oil and gas exploration company which is listed on the ASX - Icon, together with joint venture partners, had expended approximately $165 million pursuant to an authority to prosect (ATP) permit issued under the *Petroleum and Gas (Production and Safety) Act 2004* (Qld) - Icon applied for a renewal of the ATP, supported by various documents, including a Financial Capability Statement - a delegate of the Chief Executive, Department of Resources, refused to accept the application for renewal - Icon sought judicial review of this decision - Icon contended that the decision-maker misconstrued the meaning of "address" in s82(1)(e) of the Act in determining that the renewal application did not "address the capability criteria"; misconstrued the meaning of "capability" as to financial resources in construing "capability" as to financial resources as requiring that all the funds required to carry out the authorised activities for the authority be "readily available"; and misconstrued the question to which he had to direct himself in determining whether the requirement under s82(1)(e) of the Act had been met, which required the decision-maker to inquire whether information had been provided which was directed to the financial resources available to Icon to carry out authorised activities, not whether the Minister could be satisfied that Icon had sufficient financial resources - held: to determine whether the decision-maker had erred, it was necessary to construe the nature of the decision-making under s842 of the Act and the meaning of the words used in s82(1)(e) having regard to s43(1)(b) - Icon's proposed construction accorded with the purpose of s842 that would best achieve the objective of the Act to create an effective and efficient regulatory system for the carrying out of petroleum activities - the meaning of "address" proposed by the Chief Executive did not accord with the natural and ordinary meaning of "address" in the context of "address the capability criteria" in s82(1)(e) - on its ordinary and natural meaning, "address" refers to responding to or directed to the capability criteria - in considering whether the requirement under s82(1)(e) has been addressed, the Chief Executive under s842 is not required to carry out an evaluative exercise of the quality of the information, nor is the Chief Executive's task to determine whether prima facie the Minister could be satisfied of the capability criteria, as opposed to determining whether information has been provided addressing those criteria - that assessment is left to the Minister, who must, under s84(2)(b), be satisfied of the capability criteria before granting the application - the decision-maker had erred in law by misconstruing the meaning of "address" in s82(1)(e), and by

asking the wrong question in assessing whether the renewal application met the relevant requirements - these errors were jurisdictional errors - these errors were also material - a declaration should be made that the decision was null and void - the Court also declared that the renewal application complied with the Act when it was made - whether Icon had actually satisfied the capability requirements would be a matter for the Minister.
Icon Energy Limited (I B C)

Reger & Hanney [2023] FedCFamC1F 805
Federal Circuit and Family Court of Australia (Division 1) First Instance
Christie J
Private international law - parenting orders in family law cases - in 2021, a child was born in the USA to an American father and an Australian mother - in 2022, the child travelled to Australia with her mother, and the father followed later that year - in 2023, another child was born in Australia - also in 2023, the first child travelled with the father to the USA - the father then filed a petition of divorce in a state court in the USA, seeking parenting orders in respect of both children - the mother commenced proceedings in the Federal Circuit & Family Court - held: the USA is a signatory to the *Convention on the Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children*, but has not taken steps to ratify that Convention, and so is treated as a non-Convention country for the purposes of Pt XIIIAA of the *Family Law Act 1975* (Cth) - pursuant to s111CD(1)(e) of that Act, read with s69E, the Federal Circuit and Family Court would only have jurisdiction in respect of the older child if the Court found that she is habitually resident in Australia - habitual residence is a question of fact - the High Court case of *LK v Director General Department of Community Services* [2009] HCA 9; 237 CLR 582 gives guidance about the type of factual matters that are relevant in determining the habitual residence of a child - the older child was born in the USA, was a citizen of both the USA and Australia, was present in the USA, lived in the USA with both her parents from birth until mid-2022, lived in Australia with her mother from mid-2022 and with her mother and father from late 2022 to early 2023, and travelled to the USA with her father in early 2023 - the parties had a short volatile relationship during which they argued frequently - under the law of the US state in which the father had filed his petition, that state did not have home state jurisdiction in respect of the older child at the time the father filed the petition, and the earliest date on which it could acquire such jurisdiction was at the end of October 2023, and it was not apparent how that state could assume such jurisdiction over the younger child - the fact that the court in that state may have jurisdiction in respect of the older child in the future did not mean the Federal Circuit and Family Court should not hear the matter until such time as that US state court obtained jurisdiction - it was difficult to discern a shared settled purpose between the parents as to residency - the time at which the Court must consider the habitual residence of the child is the time of the application - parental intention is not to be given controlling weight - the Court would have significant concerns about the mother's capacity to give her purported consent to the child travelling to the USA, given the concessions of the father about some of his conduct as regards the mother - there was presently no jurisdiction to hear and determine an application in respect

of the older child in the place where she is present - the older child was habitually resident in Australia - the Federal Circuit and Family Court was not a clearly inappropriate forum to hear the parenting dispute in respect of both children - until further order the mother should have sole parental responsibility for both children, and both children should live with the mother in Australia - the older child should be returned immediately to NSW, and the father was ordered to deliver the older child to the mother or maternal grandfather at the US state courthouse at a date and time nominated by the mother - other relief also granted regarding passports and the younger child being placed on the Family Law Watchlist at all points of arrival and departure in Australia.
Reger & Hanney (I B)

CJ v Secretary of the Department for Education, Children and Young People [2023] TASFC 5
Full Court of the Supreme Court of Tasmania
Pearce, Geason, & Jago JJ
Administrative law - a magistrate made a care and protection order under the *Children Young Persons and Their Families Act 1997* (Tas) giving custody of the appellant's daughter to the Secretary of the Department administering that Act until the child attained the age of 18 years - the appellant applied for revocation of that order - the magistrate dismissed this application, and a judge of the Supreme Court dismissed an appeal from that decision - the appellant appealed to the Full Court of the Supreme Court - held: in performing functions or exercising powers under the *Children Young Persons and Their Families Act*, the best interests of the child must be the paramount consideration - the primary judge had been correct to dismiss the appeal from the magistrate's decision - the *Children Young Persons and Their Families Act* required that, before the appellant could succeed in revoking the magistrate's original order, she had to demonstrate to the magistrate that there had been a material change in circumstances between the date of the first order and the date of the hearing - the magistrate did not have evidence before her capable of justifying that conclusion - the primary judge had been correct to conclude that this was the case - s107 of the *Justices Act 1959* (Tas), requires there to be shown an error or mistake on the part of the magistrate on a matter or question of fact alone, or of law alone, or of both fact and law - a motion to review is not of the nature of an appeal by way of rehearing and the principles of *Warren v Coombes* [1979] HCA 9; 142 CLR 531 do not apply - on a review of the conclusion of a magistrate based on the evidence, the question is whether upon the evidence the magistrate might, as a reasonable person, have come to the conclusion to which he or she did - the primary judge had not made any material error, had not been unfair, and had not lacked impartiality - it would be pointless to remit the application to the magistrate for re-hearing after such delay of almost a year during the appeals process - appeal dismissed.
CJ (I B)

Poem for Friday

Sonnet 1: I thought once how Theocritus had sung

By: Elizabeth Barrett Browning (1806-1861)

I thought once how Theocritus had sung
Of the sweet years, the dear and wished-for years,
Who each one in a gracious hand appears
To bear a gift for mortals, old or young:
And, as I mused it in his antique tongue,
I saw, in gradual vision through my tears,
The sweet, sad years, the melancholy years,
Those of my own life, who by turns had flung
A shadow across me. Straightaway I was 'ware,
So weeping, how a mystic Shape did move
Behind me, and drew me backward by the hair;
And a voice said in mastery, while I strove,
"Guess now who holds thee?" – "Death," I said, But, there,
The silver answer rang, — "Not Death, but Love."

Elizabeth Barrett Browning (6 March 1806 to 29 June 1861), was of Victorian England's best known poets. She grew up at Hope End, a 500-acre estate in Herefordshire which her father bought when Elizabeth was three years old. She lived there with her 10 surviving siblings and her parents. She wrote poetry from a very young age. Her family had lived in Jamaica for a generation, from 1655, deriving their wealth from the sugar cane plantations and slave labour. Elizabeth lived a life of freedom from the usual constraints of the time, riding and fishing. After the death of her brother Edward, by drowning she closed her small circle of friends to a handful of people only. Barrett-Browning wrote *Sonnets from the Portuguese*, a collection of 44 love sonnets, between 1845 and 1846. She married Robert Browning, secretly in 1846 when she was 40 and he was 34 years old. Consequently, her father disinherited her. From 1846 she and her husband lived in Italy. She suffered from a debilitating condition throughout her life with symptoms of general exhaustion and weakness, spinal pain and possibly tuberculosis. She wrote The Cry of the Children, condemning child labour and she campaigned for the abolition of slavery. She died in 1861 at the age of 55, in Florence, Italy

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