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# Benchmark

**Friday, 22 September 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)

**In the matter of Gunyahweh Pty Limited** (NSWSC) - oppression under s232 of the *Corporations Act 2001* (Cth) was established, but the Court declined to grant any relief (I B)

**Fairfield City Council v Bastow Civil Constructions Pty Ltd** (NSWSC) - s45(3) of *the Impounding Act 1993* (NSW) does not positively confer a statutory right of action against the impounding authority, but the respondent succeeded in common law negligence (B I)

**Lynden Iddles & Anor v Fonterra Aust Pty Ltd & Ors** (VSC) - Court approved settlement agreement of class action, including common fund order and commission to the litigation funder, but disallowed the funder's claim to recoup after the event insurance premiums from the settlement sum (I B)

**Karam Group Pty Ltd ATF The Karam (No. 1) Family Trust v HCA Queensland Pty Ltd & Ors** (QSC) - adjudicator under the *Building and Construction Industry Payments Act 2004* (Qld) was not disqualified for apprehended bias merely because he had sought the parties' views on his proposed construction of the building contract (B C I)

**Rijven v Lynam and Rijven** (ACTSC) - Court set aside previous consent orders in a family provision case and made new consent orders, as the executors had not informed the Court of the opposition to those orders by one beneficiary (I B)

# HABEAS CANEM

## Portrait with sunshine and smile

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## Summaries With Link (Five Minute Read)

**In the matter of Gunyahweh Pty Limited [2023] NSWSC 1133**
Supreme Court of New South Wales
Black J
Oppression - Gunyahweh sought orders for possession of part of land at Chowan Creek against one of its shareholders, Smith - Smith cross-claimed against Gunyahweh and four other shareholders, in contract and estoppel, and for oppression under s232 of the *Corporations Act 2001* (Cth) - orders for possession were made by consent - Smith alleged the purpose of the company was to own the property so that the shareholders could enjoy a right to occupy a portion of it, and there was an agreement to that effect, or representations had been made to that effect on which he had relied - held: there was no such agreement or representation - however, the Court did not approach the oppression claim on the same narrow basis - oppression extends to conduct involving commercial unfairness or where the conduct complained of involves a visible departure from the standards of fair dealing and a violation of the conditions of fair play, or a decision has been made so as to impose a disadvantage, disability or burden on the plaintiff that, according to ordinary standards of reasonableness and fair dealing, is unfair - each case has to be considered on its own facts and circumstances, and by reference to the conduct as a whole - before registration of the company, Smith and the other founding shareholders had understood that the company would buy the property to allow its shareholders to reside there, although that was well short of an enforceable agreement or right, and did not identify the portion of the property or the terms on which that could occur - some other shareholders continued to enjoy occupancy of a portion of the property - oppression was established, by analogy with *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* [2011] NSWCA 104 (2011 NSWCA), where the shareholders had failed to implement an arrangement for separation of their respective interests so that the value of one shareholder's equity was locked in the companies, the income attributable to that equity had ceased, there was no ready prospect that that party could sell that equity to anyone else for fair value, and resumption of cooperation between the parties was not possible - however, the Court would not order Smith be allowed to occupy part of the property, given the extent of the disputes between him and the other shareholders who occupied of the property, and the fact that this would be inconsistent with Smith's consent to an order for possession - neither party had led evidence to the Court to determine the value of the company's shares based on the value of the property - it was not possible to make a buy-out order - a winding up order would defeat what was originally likely an idealistic attempt to create a community with shared values at the property - further, Smith had been confrontational in his dealings with other shareholders and had significantly contributed to the disputes with them, and had not led expert evidence to show that his shares had material financial value, and had not established that he had made any material financial contribution to acquire those shares - cross-claim dismissed - parties to agree on the appropriate costs orders or to make competing submissions.
View Decision (I B)

**Fairfield City Council v Bastow Civil Constructions Pty Ltd [2023] NSWSC 1143**
Supreme Court of New South Wales
Mitchelmore J
Negligence - Bastow carried on a business that included horizontal directional drilling for laying cables and pipe work - around 2007, it purchased a second-hand truck for approximately $97,000, and used that truck in its business until 2018 - it then listed the truck for sale online, and delivered the truck to a repairer to obtain a brown slip (the truck equivalent of a pink slip) so that it could renew the truck's registration - the repairer issued the brown slip and parked the truck in a nearby cul-de-sac in Smithfield, as there was no room on the repairer's premises - a Council officer observed the truck, and, about a month later, placed a notice to impound motor vehicle sticker on the front driver's side window, and caused a notice of intention to impound to be sent to Bastow's last known address, which Bastow said they did not receive - the Council officer later issued a penalty notice to Bastow for abandoning the truck - Council then impounded the truck and sent a further letter to Bastow, which again Bastow said they did not receive - Council then sold the truck at auction - there was a factual dispute as to whether Bastow had communicated with Council before the sale - Bastow sued Council, alleging that it had a statutory duty to act with reasonable care in respect of the sale of the truck, and in negligence - a Local Court Magistrate found for Bastow on both bases - Council appealed to the Supreme Court as of right on questions of law, and Bastow filed a notice of contention, seeking leave to rely on one ground that raised a mixed question of fact and law - held: s45(3) of *the Impounding Act 1993* (NSW) does not positively confer a statutory right of action, and the Magistrate's conclusion to the contrary was not consistent with the terms of the provision or with its statutory purpose - s45(3) operates to protect impounding authorities from actions for damages unless the person who would otherwise have that right of action establishes that an authority acted without good faith or reasonable care - s43 of the *Civil Liability Act 2002* (NSW) applies only to claims for breach of statutory duty - the Magistrate had therefore erroneously applied s43 in considering the negligence claim - although the Magistrate had also erred in her approach to the application of s43A of the *Civil Liability Act*, on the correct approach to s43A the Magistrate's conclusion that that section was engaged was correct - however, s43A did not apply in this case, as Bastow was granted leave to rely on the mixed ground of fact and law in its notice of contention, and had discharged its onus of showing that Council's decision to sell the truck was, in the circumstances, so unreasonable that no authority could have properly considered its sale of the truck to be a reasonable exercise of its statutory power - there had been multiple failures of Council's policy up to the date on which the Council sold the truck - appeal dismissed.
View Decision (B I)

**Lynden Iddles & Anor v Fonterra Aust Pty Ltd & Ors [2023] VSC 566**
Supreme Court of Victoria
Delany J
Class actions - the Iddles were dairy farmers who brought a group proceeding pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) on their own behalf and on behalf of all entities who

had supplied milk to Fonterra in 2015 from farms in Victoria, New South Wales, Tasmania, or South Australia pursuant to a certain agreement - the Iddles contended that, when Fonterra reduced the farmgate milk price for the 2015 season, it had breached its contracts with them and with the group members - Fonterra denied liability - the parties reached a settlement agreement under which Fonterra agreed to pay $25million inclusive of costs and without admission of liability - the Iddles applied for approval pursuant to s33V of the *Supreme Court Act* - held: when determining whether to approve the settlement, it was necessary to consider: (1) whether the settlement was fair and reasonable as between the plaintiffs and the defendants, having regard to the interests of the group members considered as a whole; (2) whether the arrangements for sharing the settlement sum between the plaintiffs and group members and the provisions of the settlement agreement and the settlement distribution scheme were fair and reasonable as between the plaintiffs and group members who are bound by the settlement; (3) whether the Court has power to make a common fund order for payment to the litigation funder, first as reimbursement of legal costs, including insurance premiums, and second of a funding commission out of the settlement sum, and, if so, whether such an order should be made; and (4) whether the proposed deductions from the settlement sum, including the funder's commission and the legal costs, both paid and unpaid, and the funder's costs of after the event (ATE) insurance should be allowed - the Court was satisfied that the proposed settlement was fair and reasonable as between the interests of the plaintiffs and defendants, and that the distribution arrangements for the settlement sum, including in relation to set-off of amounts owning under Fonterra Australia Support Loans, were reasonable as between the plaintiffs and the group members and as between all group members - it is within the power conferred on the Court by s33V and s33ZF of the *Supreme Court Act*, and it was appropriate, to make a common fund order, allowing as deductions from the settlement sum a payment to the Iddles of $30,000 and a funder's commission of 27.5% - legal costs and disbursements were to be deducted from the settlement sum in accordance with the reports of the referee as to costs, whose reports the Court adopted - the cost of ATE insurance, and whether or not it should fall within the rate of commission or should be allowed in addition to commission, must be determined on a case by case basis - if the cost of the ATE insurance premiums were to be allowed, the percentage of the settlement sum to be paid to the funder would increase to 31.68% - ATE insurance premium costs are part of the costs of doing business - it was not appropriate in this case to allow the funder's costs of ATE insurance.
Lynden Iddles & Anor (I B)

**Karam Group Pty Ltd ATF The Karam (No. 1) Family Trust v HCA Queensland Pty Ltd & Ors [2023] QSC 212**
Supreme Court of Queensland
Muir J
Security of payments - Karam and HCA contracted for HCA to design and construct the Maasra Apartments, a mixed-use development of residential apartments and commercial space located in the inner Brisbane suburb of Coorparoo - HCA was close to achieving practical completion under the contract and that most of the remaining work related to rectification of defects and

preparation of as-built drawings - HCA served a payment claim under the *Building and Construction Industry Payments Act 2004* (Qld) in an amount of over $15million - the Superintendent then issued Karam with a payment certificate in the sum of nearly $24million - HCA lodged an adjudication application in respect of the payment claim and payment certificate, and said that the amount should be about $4.6million - the adjudicator issued requests for further submissions - Karam sought interlocutory orders restraining the adjudicator from giving an adjudication decision or accepting any further appointment as adjudicator in respect of the contract - Karam contended that statements made by the adjudicator in the requests for submissions gave rise to a reasonable apprehension of bias - held: the authorities recognise that an adjudicator is obliged to comply substantially with the rules of procedural fairness and natural justice - this includes an obligation not to be subject to actual or apprehended bias - the governing principle for apprehended bias is that a decision maker is disqualified if a fair-minded lay observer might reasonably apprehend that the decision maker might not bring an impartial mind to the resolution of the question the decision maker is required to decide - deciding whether a decision maker might not bring an impartial mind to the resolution of a question requires no prediction about how the decision maker will in fact approach the matter - a number of Karam's complaints were, in substance, based on Karam's subjective perception of the adjudicator's proposed construction of the contract, and a perception that that proposed construction was in error - the Court was not satisfied that the language used by the adjudicator in raising the various issues for response by the parties meant that he had made a rigid and final determination about those matters - all of Karam's complaints stemmed from potential concerns and queries raised by the adjudicator in specific terms and about which he sought the parties comments and views - raising these specific issues and giving the parties the opportunity to provide submissions in response, in the way the adjudicator did, was not only consistent with his legislative role, but stood as a hallmark of procedural fairness - on an objective analysis, the matters raised by Karam did not give rise to a serious question to be tried regarding apprehended bias - further, the balance of convenience weighed in favour of HCA - application for interlocutory injunction dismissed.
Karam Group Pty Ltd ATF The Karam (No. 1) Family Trust (B C I)

**Rijven v Lynam and Rijven [2023] ACTSC 265**
Supreme Court of the Australian Capital Territory
McWilliam J
Family provision - one of the three children of a deceased brought a family provision application against the executors, who were the other two children - the parties reached agreement, and the Court gave effect to that agreement in consent orders - the estranged wife of one of the executors was a beneficiary under the will - this estranged wife was not a party to the proceeding and was not heard - she had attended the hearing, made her opposition known to the executors, and had tried to file an affidavit explaining her position to the Court - she contended that she had been denied procedural fairness, and filed an application to set aside the consent orders - all parties then reached a further agreement, and sought to set aside the previous consent orders and have new consent orders made - held: the Court's role in making

orders in family provision proceedings involves more than placing a rubber stamp on the transaction - the *Family Provision Act 1969* (ACT) requires certain thresholds to be met before an order can be made adjusting property interests, and those thresholds must be met even where there is agreement compromising a claim - the fact of an agreement is a very significant matter for the court in determining whether to make orders in accordance with that agreement, even where one party to the agreement opposes giving effect to it, particularly so where the parties to the agreement were represented by a solicitor and counsel at the time that the agreement was entered into - settlements of family provision proceedings are to be encouraged as a matter of policy - where one party opposes the making of orders in accordance with a compromise agreement, that will require the court to consider the underlying facts to a greater extent, in order to ascertain whether there would be some injustice in giving effect to the agreement - the Court has inherent jurisdiction to set aside orders made by consent if the judgment has been irregularly entered, which is reflected in r1613(2)(d) the *Court Procedures Rules 2006* (ACT) - this had been a case where the interest of at least one of the executors had conflicted with the interests of his estranged wife as one of the beneficiaries, and her opposition to the settlement had been known to the executors - even if there were very sound reasons for the settlement that had been reached, it was incumbent upon the executors, as the representatives of all beneficiaries, to in fact represent their interests, to enable the court to adjudicate effectively and completely on all issues in dispute - at the time the first orders were made by consent, the Court was not informed of any competing position of any beneficiary, and proceeded on a misapprehension that the executors continued to represent the interests of all beneficiaries so that the orders bound all beneficiaries - the evidence established that the statutory thresholds enlivening the Court's power to make an order under the *Family Provision Act* had been met - first consent order set aside and new consent orders made.
Rijven (I B)

# Poem for Friday

**Study Nature**

**By:** Gertrude Stein (1874-1946)

I do.
Victim.
Sales
Met
Wipe
Her
Less.
Was a disappointment
We say it.
Study nature.
Or
Who
Towering.
Mispronounced
Spelling.
She
Was
Astonishing
To
No
One
For
Fun
Study from nature.
I
Am
Pleased
Thoroughly
I
Am
Thoroughly
Pleased.
By.
It.
It is very likely.
They said so.

Oh.
I want.
To do.
What
Is
Later
To
Be
Refined.
By
Turning.
Of turning around.
I will wait.

**Gertrude Stein,** an American playwright, novelist, poet and art collector, was born on 3 February 1874 in Pennsylvania, the youngest of 5 children. Her family moved to Paris when she was three, returning to live in Oakland, California in 1878. Her mother died when she was 14, and her father died three years later. She attended Radcliffe College. In 1897 she enrolled in Johns Hopkins School of Medicine but left in her fourth year. She collected art throughout her life. She moved to Paris in 1903 where she remained for the rest of her life. She met her life partner Alice B. Toklas in 1907. She was an associate of Picasso, Hemingway, F. Scott Fitzgerald and Matisse, who she often hosted in her famous Salons. In 1933 she published *The Autobiography of Alice B Toklas*, a bestselling autobiography, written by her in the voice of her partner. Although Jewish, In the Second World War she was a collaborator with Vichy, France, and wrote supporting Hitler and the Nazis. Some suggest that her support was expedient, however her writings praised the regime after the war hand ended. She died in 1946 in France following surgery for stomach cancer. Her last words before falling into a coma are said to have been “What is the answer?” and when she received no response “In that case, what is the question?”. Alice B. Toklas was later buried next to her.

**Kathy Bates**, actor, reads “If I Told Him, a completed portrait of Picasso ” by Gertrude Stein
https://www.youtube.com/watch?v=52aasryN_Wc

A home move of the Stein home in 1927
https://www.youtube.com/watch?v=wX4NMuJGOsY

**Gertrude Stein** reads extracts from “The Making of Americans”, a novel completed by her in 1911, and first published in book form in 1925
https://www.youtube.com/watch?v=SKOo28Cvqi4

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