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# Benchmark

Friday, 28 April 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)

**El Khouri v Gemaveld Pty Ltd** (NSWCA) - compliance with planning instruments is not a prerequisite to the exercise of power by the Land and Environment Court when granting development consent under s34(3) of the *Land and Environment Court Act 1979* (NSW) following a successful conciliation (I B C)

**Mt Owen Pty Ltd v Parkes** (NSWCA) - vicarious liability upheld against a "host" employer under a labour hire agreement, rather than actual employer (I B C)

**In the matter of SRD Property Pty Limited** (NSWSC) - shareholder oppression established and buy-out orders made (I B)

**Singh & Ors v Singh & Ors** (NSWSC) - construction of consent orders that resolved a dispute between competing factions of the North Shore Sikh Association of Sydney Inc (I)

**Replay Australia Pty Ltd v NightOwl Properties Pty Ltd** (QCA) - a lessee who had been unable to exercise an option because it was in default was also not entitled to relief against forfeiture of that option (B I)

**Stephens v Trustees of the Roman Catholic Church for the Archdiocese of Canberra and Goulburn** (ACTSC) - limited orders for further discovery made in proceeding for historical sexual abuse (I)

# HABEAS CANEM

## Surf Shake

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## Summaries With Link (Five Minute Read)

**El Khouri v Gemaveld Pty Ltd [2023] NSWCA 78**
Court of Appeal of New South Wales
Gleeson, Leeming, & Adamson JJA
Planning law - the respondent applied for development approval including the construction of a four-story house - the *Kogarah Local Environment Plan 2012* imposed a height restriction of 9m - Council refused development consent - the respondent appealed to the Land and Environment Court - Council and the respondent held a conciliation conference under s34 of the *Land and Environment Court Act 1979* (NSW), and reached agreement under which Council would grant consent to amended plans - a Commissioner of the Land and Environment Court was satisfied that the agreed decision was one that the Court could have made in the proper exercise of its functions and granted approval to that decision under s34(3) - the respondent's neighbours sought judicial review of the Commissioner's decision on the ground the Court would not have had power to grant consent because of breach of the height restriction - held: the critical statutory words were "being a decision that the Court could have made in the proper exercise of its functions" - whether this required compliance with the height restriction, or whether it merely required the Commissioner be satisfied of compliance with the height restriction, was a question of statutory construction - the only issue for the Commissioner was whether the agreed decision was one which could have been made by the Land and Environment Court in the proper exercise of its functions - this involved the same considerations and powers as if that Court were deciding an appeal from Council's refusal - that in turn involved the same considerations and powers that Council possessed as consent authority, as the Court in such an appeal may exercise all the functions and discretions of Council - a planning instrument does not apply of its own force, directly creating rights and obligations - it operates in conjunction with primary and delegated legislation and it is the legislation that creates rights and obligations - for the purpose of jurisdiction, there is no difference between a development consent granted on the merits by Council (or by the Land and Environment Court on appeal from Council's refusal) and a development consent granted under s34(3) following a successful conciliation - in both cases, planning instruments must be considered, but in neither case is compliance with planning instruments a jurisdictional fact that is a prerequisite to the lawful exercise of power - it was plain the Commissioner had had regard to the height restriction - the only conclusion that had been open to him on the evidence was that there had been compliance with the height restriction - it was irrelevant whether there had actually been compliance with the height restriction - application dismissed.
View Decision (I B C)

**Mt Owen Pty Ltd v Parkes [2023] NSWCA 77**
Court of Appeal of New South Wales
Brereton & Kirk JJA & Basten AJA
Negligence - Mt Owen operated an open cut coal mine in the Hunter Valley - it contracted with Titan for the supply of qualified mechanics to work on its heavy machinery - three mechanics

were doing routine maintenance when one of them, Kemp, dropped the blade of the bulldozer causing the track on which another, Parkes, was standing to flick up and crush Parkes' leg - there was no dispute that Kemp had been negligent and that this negligence had caused Parkes' injury - the issue was whether Mt Owen was vicariously liable for Kemp's negligence - Mt Owen contended only one party can be vicariously liable and that that party was Kemp's employer, Titan - the primary judge found Mt Owen vicariously liable and awarded damages of just over $2 million - the primary judge also found Titan liable for its own negligent conduct in failing to ensure its employees were warned and trained to avoid risk of injury - Mt Owen appealed and Titan cross-appealed - held on Mt Owen's appeal (by the whole Court): only one party can be vicariously liable for the acts of a single negligent individual - an employer is vicariously liable for the negligent act of an employee undertaken within the scope of employment - however, the employer for this purpose may not be the legal employer - where a worker works on the premises of a "host employer", and is subject to the direction and control of that host employer, the transfer of control may lead to a transfer of vicarious liability from the legal employer to the host employer - such a finding is more readily made now than in the past, due to labour hire agreements becoming more common - Mt Owen's authority to give directions and orders to the workers Titan provided was sufficient for the transfer of control to Mt Owen and thus also sufficient for the transfer of vicarious liability - held on Titan's cross-appeal (by majority, Basten AJA dissenting): Titan had not breached its duty of care by failing to ensure its employees were warned and trained to avoid risk of injury - further, no causation had been established between any such failure and Parkes' injury“ appeal dismissed and cross-appeal allowed.
View Decision (I B C)

**In the matter of SRD Property Pty Limited [2023] NSWSC 441**
Supreme Court of New South Wales
Black J
Oppression - the plaintiff and defendants each owned half the shares in three companies engaged in property development in western Sydney - the plaintiff sought relief under s233 and s461 of the *Corporations Act 2001* (Cth) on the grounds of oppression - held: the power to grant relief under s232 is enlivened if the conduct of a company's affairs is contrary to the interest of members of a whole, or is oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member of the company - s233(1)(d) allows the Court to order a purchase of shares by a member of a company and s233(1)(j) allows the Court to make an order requiring a person to do a specified act - the Court can also make an order for winding up under s233(1)(a) or on the just and equitable ground under s461(1)(k) - s232 extends to conduct involving "commercial unfairness", or where conduct 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 is unfair according to ordinary standards of reasonableness and fair dealing - the phrase "oppressive to, unfairly prejudicial to, or unfairly discriminatory against" should be construed as a composite whole - unfairness is assessed by reference to a hypothetical objective commercial bystander - while conduct may be oppressive if

it is inconsistent with the legitimate expectations of shareholders, expectations are not immutable and the non-fulfilment of expectations *per se* does not establish oppression“ judges should not remain in their ivory tower when assessing corporate conduct - the extent to which the minority shareholder has baited the majority shareholder to act in an oppressive manner is also relevant - regarding two of the companies, the Court was not persuaded that an agreement as alleged by the plaintiff existed, but was satisfied that the defendants' failure to contribute to ongoing liabilities amounted to oppression - regarding the third company, the facts that the plaintiff had made the only capital contribution and the defendants were not cooperating in addressing the pressing issues faced by the company constituted oppression - on balance, it was preferable to order a buy-out rather than a winding up - this would be in the best interests of the companies and their creditors - orders made as to the extent to which the companies were indebted to the defendants, to the nil value of the shares in the companies, and for the sale of the shares under the control of the Court.
View Decision (I B)

**Singh & Ors v Singh & Ors [2023] NSWSC 436**
Supreme Court of New South Wales
Kunc J
Incorporated associations - two disputed elections for the governing bodies of the North Shore Sikh Association of Sydney Incorporated were held - different factions were successful at each meeting - each faction sought declarations of the validity of one meeting and the invalidity of the other - the parties engaged in a court-annexed mediation which was unsuccessful - the parties continued to negotiate through their solicitors - after a difficult process, the parties agreed to the conduct of fresh elections with a specially appointed independent chairperson, being a nominated Senior Counsel - the Court made consent orders giving effect to this agreement - the parties then disputed the implementation of those consent orders - held: neither party sought to amend the consent orders, and the Court was only concerned with the proper construction of those orders - the Court should have regard to the fact that the consent orders, albeit subject to the Court's overriding discretion, arose from a contract between the parties - the principles relevant to construction of contracts should therefore apply when construing the orders - the meaning of "members" in the consent orders was members as such under the Association's constitution - the purpose and context of the consent orders supported the construction that "member" means member as such, whether or not a member was a trustee as defined in the constitution - therefore, members of the Association who were not trustees were entitled to vote for members of the Board of Trustees - the consent orders, on their proper construction, impliedly excluded an obligation on the part of the independent Senior Counsel chairing the meeting to afford natural justice - no term should could be implied into the consent orders that the decision of that Senior Counsel could be challenged as unreasonable - motion dismissed.
View Decision (I)

**Replay Australia Pty Ltd v NightOwl Properties Pty Ltd [2023] QCA 76**
Court of Appeal of Queensland

Dalton & Flanagan JJA & Gotterson AJA
Leases - Replay was the lessor and NightOwl was the lessee under a 10-year lease that expired in 2020 - in 2015, the lease was amended by inserting an option for renewal - both the lease and the amendment were registered on title - NightOwl gave Replay written notice of exercise of the option - before the expiry of the old lease, NightOwl requested rent relief due to the Covid pandemic and prevailing government restrictions - there was correspondence on this issue but no agreement - NightOwl unilaterally paid reduced rent and outgoings until September 2020 - Replay then declined to grant the renewed lease on the ground that NightOwl had failed to comply with the prerequisites for the exercise of the option, as it was in breach by not having paid the full rent due - NightOwl sought a declaration that it had validly exercised the option - the primary judge rejected almost all of NightOwl's case, but found in favour of NightOwl on the sole basis of equitable relief against forfeiture of the option - Replay appealed - held: the primary judge had erred in deciding that equitable relief against forfeiture was available after the expiry of the old lease - this was because the option to renew had not been validly exercised, and NightOwl therefore had no surviving interest to protect against forfeiture - Replay had not been required to grant a further lease - even if NightIOwl were correct in categorising the option as a conditional contract, its interest following the expiry of the first lease would remain contingent until the option were validly exercised - appeal allowed.
Replay Australia Pty Ltd (B I)

**Stephens v Trustees of the Roman Catholic Church for the Archdiocese of Canberra and Goulburn [2023] ACTSC 88**
Supreme Court of the Australian Capital Territory
McWilliam AsJ
Sexual abuse litigation - the plaintiff alleged he had been abused between 1973 in 1975 when he was between four and seven years old by a parish priest at a Catholic primary school - the priest had died in 1977 - the plaintiff alleged that, by failing to prevent the abuse, the defendants were directly liable in negligence - the plaintiff also alleged the defendants were vicariously liable for the priest's actions - the defendants denied liability - the plaintiff sought an order that the defendants make further discovery - the defendants sought an order setting aside or limiting a number of notices for non-party production - held: under r606(1)(c) of the *Court Procedures Rules 2006* (ACT), the Court may make an order for further disclosure if it considers a party has not, or may not have, adequately disclosed discoverable documents - such orders are discretionary and not to be made lightly - there are cases where the existence of undiscovered documents can be inferred - the Court must have regard to the principal that disclosure should be limited to what is reasonably necessary for fairly disposing of the proceeding, the likely relevance and significance of any documents that may be discovered, and the likely time, cost, and inconvenience of disclosing any documents that may be discovered - the documents sought by the plaintiff related to matters in issue both directly and indirectly - there did appear to be a category of documents likely in existence that the defendants had excluded from discovery - the defendants' discovery was therefore inadequate - however, what the plaintiff sought was too broad - further discovery must strike a balance between capturing documents material to the

plaintiffs claim and limiting the discovery process to one that is manageable, and not oppressive or disproportionate - the same limits should apply regarding the notices for non-party production - as each party had had some success, both parties should bear their own costs of the applications.
Stephens (I)

## Poem for Friday

**Where Cotter Died**

**By:** Major Oliver Hogue, "Trooper Bluegum" (1880-1919)

Comrade of knapsack or bandolier,
Tread light, we pray when you pass this way;
For sake of the brave ones slumbering here
Nameless in death till the Judgment Day
Tread light, lest the tramp of your martial host
Or the rattle of rifle or bayonet blade
Should ring down the night to their silent post,
And rouse them too soon for the Grand Parade.

**Oliver Hogue**, was born on 29 April 1880 in Sydney. He attended Forest Lodge Public School. He cycled around the eastern and northern areas of Australia, riding his bike for thousands of kilometres. He was a journalist for the Sydney Morning Herald from 1907. He enlisted in 1914 in the Australian Imperial Force, and served in Gallipoli with the Light Horse Regiment. He also served with the Camel Corps from November 1916. He published poetry, usually under the pseudonym "Trooper Bluegum", in the Sydney Morning Herald. He left a book of poetry and writings written during the campaigns in Egypt and Palestine. This poem, *Where Cotter Died,* relates to the death of soldier Tibby/Tibbie Cotter. Hogue wrote *"It was round Beersheba that Tibbie Cotter was killed, with many more Light Horsemen and Cameliers. There are rough wooden crosses dotting the land… some bear the names of comrades; some are nameless".* The book "The Cameliers" by Oliver Hogue was also published after the First World War. Major Oliver Hogue survived the war, but died of influenza on 3 March 1919 at London General Hospital. His twin sister predeceased him in 1918. Bertram Stevens wrote of Hogue's letters that they "*conveyed a good deal of the happy-go-lucky spirit of the Australians, their indifference to danger, and laughter when in difficulties or in pain*".
https://www.awm.gov.au/collection/P11013263

Albert (Tibby/Tibbie) Cotter had attended Forest Lodge Public School and Sydney Grammar. He had, as a cricketer, played against England. He served at Gallipoli. He survived the Light Horse charge to capture the wells of Beersheba. He died on 31 October 1917 when he was a mounted stretcher-bearer at the Battle of Gaza.
https://adb.anu.edu.au/biography/cotter-albert-tibby-5785

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