



Friday, 18 October 2024

Daily Construction A Daily Bulletin listing Decisions of Superior Courts of Australia

Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

Executive Summary (One Minute Read)

Firmtech Aluminium Pty Ltd v Xie; Zhang v Xu; Xie v Auschn Conveyancing & Associates Pty Ltd (NSWSC) - director and general manager of company had breached their statutory directors' duties and their fiduciary duties by doing work for competing companies that one of them owned

Thousand Hills Property Pty Ltd v LBA Capital Pty Ltd (VSC) - a purchaser under a property development contract had not repudiated the contract, when an email that seemed on its face to constitute a repudiation was seen in its full context

HABEAS CANEM

Peace



Benchmark

Summaries With Link (Five Minute Read)

Firmtech Aluminium Pty Ltd v Xie; Zhang v Xu; Xie v Auschn Conveyancing & Associates Pty Ltd [2024] NSWSC 1293

Supreme Court of New South Wales

Nixon J

Directors' duties - in 2018, Xu and a married couple, Zhang and Xie, agreed to establish Firmtech Aluminium Pty Ltd to manufacture and instal aluminium windows and doors and perform façade works - Xu and Zhang were directors and 50% shareholders, and Xie was the general manager - Xu provided capital and Zhang and Xie provided industry experience and contacts - while they were director and general manager respectively, Zhang and Xie also did work in competition with Firmtech, and then informed Xu they wished to end their association with Firmtech - the parties agreed to sell two investments properties they also owned together - Xu's company, Auschn, acted as conveyancer, and Zhang and Xie claimed that Xu had caused this company to make various unauthorised payments of the sale proceeds - Xu and Firmtech sued Xiang, Xie, and the other companies they had worked through, for breach of directors' duties and fiduciary duties - Zhang and Xie also sued Xu regarding the payments made from the sale proceedings for breach of contract and breach of fiduciary duties - held: the Court was not satisfied that there was an express contractual obligation to the effect that Xie would take all steps necessary to ensure that her other company did not operate a business in competition with Firmtech, but it did not then follow that Xie was free to compete with Firmtech - each of Xie and Zhang owed duties not to improperly use their position to gain an advantage for themselves or someone else, or to cause detriment to Firmtech, under s182 of the *Corporations Act 2001* (Cth) - Zhang and Xie had promoted their personal interests, without informed consent, by pursuing and making a gain for Xie's companies where there was a conflict between their personal interests and the interests of Firmtech - they had thereby breached their statutory and fiduciary duties - Xie's company were involved in these contraventions and were also liable under the second limb of *Barnes v Addy* and s79 of the *Corporations Act* - Firmtech was entitled to an account of profits - the payments made by Xu's conveyancing company from the sale proceedings had been authorised, and these claims should be dismissed.

[View Decision](#)

Thousand Hills Property Pty Ltd v LBA Capital Pty Ltd [2024] VSC 597

Supreme Court of Victoria

Gorton J

Construction contracts - LBA Capital contracted with Thousand Hills Property for the purchase of 14 lots together with any improvements on those lots - under the contract, Thousand Hills promised to construct apartments on the property in accordance with plans that were annexed to the contract - LBA paid a deposit - LBA sent an email to Thousand Hills stating that it was in the process of winding down, and was unable to continue operating, and would not be in a position to settle - Thousand Hills said it accepted this repudiation - Thousand Hills contended it was entitled to retain the deposit - LBA denied it repudiated the contract and said Thousand

Hills must return the deposit with interest - Thousand Hills applied under s49 of the *Property Law Act 1958* (Vic) for the Court two answer the question whether LBA repudiated and Thousand Hills accepted that repudiation - held: a party repudiates a contract if it evinces an intention no longer to be bound by the contract, and it may also repudiate a contract if it conveys that it is unable to meet its contractual obligations even if it wished still to do so - the question is not what the party intended to convey, but what its words and actions would convey to a reasonable person in the position of the other party - however, an intention not to be bound by a contract will not be found lightly - LBA's email in this case had been sent at the express request of Thousand Hill's agent as the first step towards a mutual variation or cancellation of the contract, as a dispute had arisen as to whether Thousand Hills was required to construct the apartments in accordance with NDIS standards and associated delays - when the email said to have constituted a repudiation was seen in its full context, it was apparent that, despite its unfortunate and largely inexplicable wording, it would not in the unusual circumstances of this case have conveyed to the reasonable person in Thousand Hill's position that LBA did not consider itself bound by the contract or that LBA would not be able to complete the contract - LBA had not repudiated the contract - the deposit was not forfeited and must be repaid.

[Thousand Hills Property Pty Ltd](#)



Poem for Friday

In My Craft or Sullen Art

By Dylan Thomas (1914-1953)

In my craft or sullen art
Exercised in the still night
When only the moon rages
And the lovers lie abed
With all their griefs in their arms,
I labour by singing light
Not for ambition or bread
Or the strut and trade of charms
On the ivory stages
But for the common wages
Of their most secret heart.
Not for the proud man apart
From the raging moon I write
On these spindrift pages
Nor for the towering dead
With their nightingales and psalms
But for the lovers, their arms
Round the griefs of the ages,
Who pay no praise or wages
Nor heed my craft or art.

Dylan Marlais Thomas, poet, writer and broadcaster, was born on 27 October 1914 in Swansea, Glamorgan, Wales. His well-known works include *Under Milk Wood*, "a play for voices", *Do not go gentle into that good night*, and, *And death shall have no dominion*. He loved Wales but was not a Welsh nationalist. His father wrote that he was "*afraid Dylan isn't much of a Welshman*". Robert Lowell, wrote of criticism of Thomas' greatness as a poet, "Nothing could be more wrongheaded than the English disputes about Dylan Thomas's greatness...He is a dazzling obscure writer who can be enjoyed without understanding." The Welsh Academy Encyclopedia of Wales described him, and particularly his life in New York City before his death as a "roistering, drunken and doomed poet."

Dylan Thomas reads "In My Craft or Sullen Art"

<https://www.youtube.com/watch?v=Tiw3uOT2eUc>

Read by **Colin McPhillamy**, actor and playwright. Colin was born in London to Australian



parents. He trained at the Royal Central School of Speech and Drama in London. In the UK he worked in the West End, at the Royal National Theatre for five seasons, and extensively in British regional theatre. In the USA he has appeared on Broadway, Off-Broadway and at regional centres across the country. Colin has acted in Australia, China, New Zealand, and across Europe. Colin is married to Alan Conolly's cousin Patricia Conolly, the renowned actor and stage

actress: https://en.wikipedia.org/wiki/Patricia_Conolly and <https://trove.nla.gov.au/newspaper/article/47250992>.

[Click Here to access our Benchmark Search Engine](#)