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

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Executive Summary (One Minute Read)

Hanson Construction Materials Pty Ltd v Decmil Australia Pty Ltd (VSC) - adjudicator under the *Building and Construction Industry Security of Payment Act 2002* (Vic) erred in taking an excluded amount into consideration

Sumervale Pty Ltd v Viva Energy Refining Pty Ltd (VSCA) - land in industrial area still burdened by restrictive covenants designed to ensure residential amenity - removal of covenants sought to enable use as service station - nearby service station owners could not rely on loss of absence of competition as an injury justifying maintenance of the covenants

Summaries With Link (Five Minute Read)

Hanson Construction Materials Pty Ltd v Decmil Australia Pty Ltd [2024] VSC 361

Supreme Court of Victoria

Stynes J

Administrative law - Decmil subcontracted Hanson to supply and deliver concrete and associated mixing, testing and pouring services for the construction of 52 wind turbines - Hanson served a payment claim under the *Building and Construction Industry Security of Payment Act 2002* (Vic) in relation to a foundation - Decmil responded with a payment schedule stating a nil amount to be paid, on the basis that the foundation was defective and that Decmil was entitled to set off the costs of rectification, which were greater than the amount of the payment claim - an adjudicator under the Act found that the foundation was defective, Decmil was entitled to a set off, but in an amount less than the payment claim, leaving an amount of about \$700,000 payable to Hanson under the payment claim - Hanson sought judicial review of the adjudicator's decision - held: the rectification costs claimed by Decmil were an excluded amount for the purpose of s10B of the Act - an "excluded amount" relevant includes "any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract" - s23 provides that, in determining an adjudication application, the adjudicator must not take into account any part of the claimed amount that is an excluded amount - there is an important difference between the NSW and Victorian Acts, in that the Victorian Act includes s23(2B), which relevantly provides that if an adjudicator's determination takes into account an excluded amount, it is void to that extent - the Victorian Supreme Courts is also more willing than the NSW Supreme Court to order remittal of a matter to an arbitrator where jurisdictional error is established - adjudication decision quashed in so far as the adjudicator took into account the costs of rectification, and adjudication application remitted to the adjudicator to determining the adjudicated amount in accordance with law.

[Hanson Construction Materials Pty Ltd](#)

Sumervale Pty Ltd v Viva Energy Refining Pty Ltd [2024] VSCA 140

Court of Appeal of Victoria

Niall JA, Richards, & J Forrest AJJA

Restrictive covenants - the respondent intended to construct a service station on land that it owned, which would dispense hydrogen, gasoline, and diesel, and which would offers fast charging stations for battery electric vehicles - it could not do so because of four restrictive covenants requiring that there only be a single dwelling on the land, and that there could be no building erected on the land, other than a dwelling house, school, church or hall and outbuildings thereto, and there could be no trade or business carried out on the land - the respondent applied under s84(1)(c) of the *Property Law Act 1958* (Vic) for the discharge of the restrictive covenants - two owners of nearby land having the benefit of the covenants objected - these owners were both petroleum companies who wished to avoid the respondent setting up a competing service station - the primary judge ordered the covenants discharged (see

Benchmark

Benchmark 12 July 2023) - the owners sought leave to appeal - held: s84(1)(c) directs attention to whether the proposed modification or removal will 'substantially injure' the persons entitled to the benefit of the restriction - s84(1)(c) hinges on the existence of a substantial injury and not merely the loss of the benefit of the restriction - the textual distinction between injury and the loss of the benefit of the restriction also directs attention to the practical consequences that the removal or modification of the restriction might produce - the logic of s84(1)(c) requires some connection, justifying the retention of the restriction, between the covenant and the injury - a mere consequential or causal connection is not enough - to construe the concept of injury as tantamount to the loss of any benefit still being enjoyed would compel the refusal of an application unless the restriction were obsolete, and then, since s84(1)(a) applies in cases of obsolescence, this would leave s84(1)(c) with very little, if any, work to do - therefore, the purpose of the covenant constrains the kind of injury that might be occasioned by the modification or removal of the restriction - leave to appeal granted but appeal dismissed.

[Sumervale Pty Ltd](#)

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