

Friday, 18 October 2024

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

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Executive Summary (One Minute Read)

SkyCity Adelaide Pty Ltd v Treasurer of South Australia (HCA) - customers spending credits obtained from loyalty points gave rise to an amount received by a Casino in consideration for gambling - the general law of penalties did not apply to a statutorily authorised agreement between the Casino and the SA Treasurer

Automotive Invest Pty Limited v Commissioner of Taxation (HCA) - car dealer which attracted customers by styling its premises as a classic car museum nevertheless held the cars as trading stock for the purposes of the luxury car tax and GST

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

Kesper v Victorian WorkCover Authority (VSCA) - primary judge had erred in finding that a worker did not have a serious injury entitling him to bring a common law claim against his former employer

HABEAS CANEM

Peace



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Summaries With Link (Five Minute Read)

SkyCity Adelaide Pty Ltd v Treasurer of South Australia [2024] HCA 37

High Court of Australia

Gageler CJ, Gordon, Edelman, Gleeson, & Beech-Jones JJ

Taxation - SkyCity operates the SkyCity Casino pursuant to a licence granted under the *Casino Act 1997* (SA) - s16 of the *Casino Act* provides for an Approved Licensing Agreement between the licensee and the Minister - s51 imposes liability on SkyCity, as licensee, to pay casino duty - duty is calculated under a Casino Duty Agreement ("CDA") that exists pursuant to s17 - there was a dispute as to the correct interpretation of the current CDA and the duty payable in accordance with it, and the parties agreed that SkyCity would commence proceedings in the Supreme Court - the Court of Appeal answered three questions of law, (1) "Converted Credits" arising from the conversion of loyalty points by the casino's customers, when played by customers, constituted an "amount received" by SkyCity "for or in respect of consideration for gambling in the Casino premises" within the meaning of the CDA; (2) loyalty points received by customers for gambling using electronic gaming machines and automated table games do not constitute "monetary prizes" within the definition of "net gambling revenue" in the CDA; and (3) the common law or equitable principles concerning penalty clauses applied to the interest for late payment provisions in the CDA (see Benchmark 19 March 2024) - SkyCity was granted special leave to appeal to the High Court in respect of answer (1) - the treasurer sought special leave to cross-appeal in respect of answer (3) - held special leave to cross-appeal should be granted - SkyCity's approved cashless gaming system has always operated as "a system that enables the storage of monetary value for use in operating a gaming machine" - each time a customer uses SkyCity's cashless gaming system to bet, monetary value has been received by SkyCity as consideration for its acceptance of that bet, in the form of a reduction in SkyCity's indebtedness to the customer - the origin of the electronic gaming credits is irrelevant - SkyCity's appeal dismissed - the Court of Appeal's reasoning on penalties inverted the scheme of *the Casino Act* - the CDA was an agreement that was authorised and required by statute to govern the imposition of a tax - the imposition of a tax is inherently and exclusively statutory - the provisions in the *Casino Act* that authorised the CDA did not imply that the CDA must be independently capable of enforcement at common law or in equity - on the contrary, they made enforceable an agreement that would not be enforceable at common law or in equity - the Treasurer's cross appeal allowed.

[SkyCity Adelaide Pty Ltd](#)

Automotive Invest Pty Limited v Commissioner of Taxation [2024] HCA 36

High Court of Australia

Gageler CJ, Edelman, Steward, Gleeson, & Jagot JJ

Taxation - the appellant traded under the name "Gosford Classic Car Museum" - the cars in the premises were for sale, and most of the money made by the appellant was from selling the cars, although the appellant made some money from charging for admission to the museum - the Commissioner contended that the appellant was liable for luxury car tax and GST - the appellant

Benchmark

appealed under Part IVC of the *Taxation Administration Act 1953* (Cth) - the appellant' case was that each car was used only for the purpose of holding it as trading stock and that the museum concept was no more than a unique and inventive means of selling stock - the primary judge held for the Commissioner - the Full Court of the Federal Court (by majority) dismissed an appeal (see *Benchmark* 15 August 2023) - the appellant was granted special leave to appeal - held (by majority, Gageler CJ and Jagot J dissenting): the *A New Tax System (Luxury Car Tax) Act 1999* (Cth) is drafted to speak directly to the public using ordinary language and communication - it was necessary to look "at the substance and reality of the matter" and apply a "commonsense and commercial approach" - the ordinary language of s9-5(1) of that Act showed that it is concerned with the purpose for which "you have the intention" of using the car, that is, the intended rather than actual purpose of use - there is a difference between "motive", "means" and "purpose", in that "purpose" is the end goal of conduct, whereas "motive" is the reason for seeking that end goal - at the appropriate level of generality, consistently with the legislative purpose of s9-5(1), the appellant's purpose in holding the cars was to hold them as trading stock - the museum was merely the means by which this purpose was achieved, not the ultimate goal itself - even though the museum operation was substantial, at no point did it become an end in itself - neither s9-5 nor s15-30(3) of the Act is concerned with the purpose of a reasonable person and the primary judge had been correct to accept the evidence of the guiding mind of the appellant as to what his purpose was - appeal allowed.

[Automotive Invest Pty Limited](#)

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 investment 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 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 to 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](#)

Kesper v Victorian WorkCover Authority [2024] VSCA 237

Court of Appeal of Victoria

Orr & Kaye JJA, & J Forrest AJA

Workers compensation - the applicant was employed as an operating theatre technician - he developed a serious neck condition which ultimately required a discectomy and fusion at two

levels of his cervical spine - this condition was attributed to his work - the applicant sought leave to bring a common law claim against his employer, and to bring a claim for pain and suffering damages pursuant to s335(2)(d) of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) - the primary judge was not satisfied that the applicant had a serious injury within the meaning of the Act - the applicant sought leave to appeal - held: the standard of review on an appeal challenging a judge's decision to refuse leave to bring proceedings claiming damages in respect of a serious injury is the correctness standard, rather than the *House v the King* standard - although the Court should defer to the primary judge findings likely to be affected by impressions of the credibility and reliability of witnesses, unless such findings were glaringly improbable or contrary to compelling inferences, in general the Court was in as good a position as the primary judge to decide on the proper inferences to be drawn from undisputed or established facts - the primary judge's finding that the applicant's pain and suffering consequences did not satisfy the 'very considerable' test was the ultimate finding of fact, which was not informed by relevant impressions of credibility or reliability, and the Court was in as good a position as the primary judge to determine whether it was correct - the applicant had a permanent impairment of his cervical spine attributable to his employment which was fairly described as more than significant or marked, and at least very considerable - the trial judge had erred in refusing the application - indicia of serious injury referred to in previous case might be used to determine whether serious injury was made out, but could not qualify the statutory language - leave to appeal granted, appeal allowed, and leave to bring the common law claim granted.

[Kesper](#)

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>.

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