



Friday, 1 November 2024

Weekly Banking Law Review

Selected from our Daily
Bulletins covering Banking

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Executive Summary (One Minute Read)

Nick Scali Ltd v Lion Global Forwarding Pty Ltd (FCA) - freight forwarder exercised contractual lien over shipping containers - interlocutory orders requiring release of containers refused

Joudo v Joudo (NSWCA) - Court of Appeal upheld the finding of a joint endeavour constructive trust where the respondents had contributed to the upkeep of a property and the appellant now sought to retain the benefit of those contributions, contrary to the arrangement between the parties

Tonk Sydney Pty Ltd v I Lend Capital Pty Ltd (NSWSC) - purported contracts entitled a loan broker to fees was subject to a condition precedent that the deal for which the loan was required would go ahead

HABEAS CANEM

Pig, Dog and Bougainvillea



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Summaries With Link (Five Minute Read)

Nick Scali Ltd v Lion Global Forwarding Pty Ltd [2024] FCA 1247

Federal Court of Australia

Stewart J

Admiralty law - Lion was a freight forwarder which purported to exercise a contractual possessory lien over about 240 shipping containers of furniture imported by Nick Scali from China and Vietnam to Australia, most of which was pre-ordered household furniture - Nick Scali sought urgent interlocutory orders that it pay the amount claimed into court and that Lion be compelled to release the containers to it - held: on the evidence before the Court, there was not a serious case to be tried on any basis other than that Lion's standard trading terms and conditions were incorporated into the contract between Nick Scali and Lion - the Court was satisfied on the basis of that that Nick Scali's claim was a general maritime claim under s4(3)(f) of the *Admiralty Act 1988* (Cth), that is, "a claim arising out of an agreement that relates to the carriage of goods or persons by a ship" - there was no material dispute about the amounts owing - Nick Scali was substantially overdue in making payment to Lion because it feared, with some justification, that even if it paid it may not get its goods because of a dispute between Lion and the Chinese shipping company Lion had engaged - however, that provided no contractual basis to resist payment, and was not an answer to Lion's assertion of its lien - Nick Scali also justified resisting payment on the basis that it had a claim for breach of contract against Lion, and the amount of damages might exceed the amount it owed Lion - however, there was no serious question to be tried that Lion had breached the contract, and no evidence of the quantum of such a claim at all - interlocutory injunction refused.

[Nick Scali Ltd](#)

[From Benchmark Wednesday, 30 October 2024]

Joudo v Joudo [2024] NSWCA 258

Court of Appeal of New South Wales

Bell CJ, Gleeson, & Stern JJA

Constructive trusts - the appellant alleged she had an oral agreement with the respondent whereby the appellant agreed to lease property to the respondent and her children for \$600 per week - the appellant commenced proceedings for \$181,800 in unpaid rent for the prior 6 years (accepting that a claim for earlier rent was statute barred) - the respondent and her husband cross-claimed, contending that the agreement was that the appellant would build a house for the respondent and her family to live in for life, on condition that the respondent and her husband would assist in completing the construction of the home, pay utilities, and maintain the home and the property - the property had been sold, and the respondent and her husband sought a declaration that the appellant had held it on constructive trust, and that the proceeds of sale should be distributed to the parties in repayment of their contributions with any surplus to be split equally, or, in the alternative, equitable compensation - the primary judge held that the respondents' constructive trust claim succeeded (see Benchmark 21 March 2024) - the appellant appealed - held: there was mutual economic benefit for both the appellant and the

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respondents in the joint endeavour - in any event, the proposition that there must be mutual economic benefit before a constructive trust may be imposed has been rejected in NSW - similarly, the proposition that a constructive trust can only be imposed where the parties have not adverted to what would happen to a property the subject of a joint endeavour if the basis of the arrangement were removed would impose an unattractive fetter on an equitable remedy whose flexibility is central to its operation - the primary judge did not err by treating the series of mortgage payments made by the respondents to discharge the appellant's obligations under the mortgage as contributions to the joint endeavour - these payments bore the objective character of contributions and could bear that character even though they were not initially contemplated when the joint endeavour was formed and were motivated by a desire to assist the appellant discharge her immediate legal obligations in relation to the mortgage - it was the entire nature of the agreement between the parties that the respondents would live in the property rent-free on the condition that they contributed to its construction, maintenance, and improvement, which they did, and it was the departure from that arrangement, following the breakdown of the relationship, with the consequent move to evict the respondents, and the appellant retaining the benefits of their material contributions in a way that was not intended, that rendered the circumstances unconscionable and warranted the imposition of a constructive trust - to require the value of notional rent to be taken into account and deducted from the contributions would be to change the arrangement entirely - appeal dismissed.

[View Decision](#)

[From Benchmark Friday, 1 November 2024]

Tonk Sydney Pty Ltd v I Lend Capital Pty Ltd [2024] NSWSC 1350

Supreme Court of New South Wales

Richmond J

Contracts - I Lend claimed brokerage fees and a commitment fee from the plaintiffs, which it claimed was payable pursuant to agreements between I Lend and the plaintiffs in relation to a proposed loan from a third party to the plaintiffs to purchase property at Cronulla - the plaintiffs contended that they did not enter into the agreements with I Lend, and, if they did, the claimed amounts were not payable - I Lend lodged caveats over property owned by directors of the plaintiffs, and registered security interests against each of the plaintiffs on the Personal Property Securities Register - the plaintiffs commenced proceedings, seeking declarations that there was no intention by the plaintiffs to enter into legal relations with the defendants as set out in the agreement, and that I Lend had procured the plaintiffs' directors' signatures on the agreements by misleading and deceptive conduct - I Lend cross-claimed for the amounts it said it was owed - held: an agreement is not contractually enforceable unless a reasonable person in the position of each party would think that the other intends to create legal relations - a document which outward appearances constitutes a contract may be subject to a condition precedent which prevents it from being binding until the condition precedent is satisfied - on the evidence, the arrangement discussed between the parties for I Lend to have a mandate to procure an offer for finance for the plaintiffs was subject to a condition precedent that the plaintiffs were successful in entering into a contract to purchase the Cronulla property - as this condition was never

satisfied, the contracts did not come into existence - if this conclusion was wrong, and the contracts did come into existence, they would have been shams, in the sense of being a mere piece of machinery (indeed a worthless piece of paper) for serving some purpose other than that of constituting the whole of the arrangement which it purports to give effect, and the claimed fees would not have been payable, as ILend would not have performed the service for which it claimed to be entitled to receive payment - declarations made as sought.

[View Decision](#)

[From Benchmark Tuesday, 29 October 2024]

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INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Case of Kobaliya v Russia (EUHRTS) - European Court of Justice found that, in its overly broad definition of 'foreign agents', Russia committed multiple violations of the *European Convention on Human Rights*

Summaries With Link (Five Minute Read)

Case of Kobaliya v Russia, No 39446/16

European Court of Human Rights

Pastor Vilanova P, Schukking, Serghides, Roosma, Ktistakis, Mjöll Arnardóttir, & Kovatcheva JJ
Prior to its exclusion from the Council of Europe in 2022, Russia was bound by the *European Convention on Human Rights* and subject to the jurisdiction of the European Court of Human Rights. Here the activity in question occurred between 2012 and 2022 and related to fundamental rights to freedom of expression and assembly as guaranteed by the Convention. Under Russian law, non-governmental organisations (NGOs), media organisations, and individuals who received any foreign support were required to register as 'foreign agents' and conform to restrictions placed on persons so designated. The complainants alleged that the statutory definition was so overly broad as to impinge on rights to freedom of expression and freedom of assembly guaranteed by Articles 10 and 11 of the *European Convention*. The European Court found that the Russian legislation was unlawful because it was overly broad and employed the stigmatising term 'foreign agent' to a very wide universe of parties that could not all be lumped together as 'foreign agents'. Under Russian law, once designated as a foreign agent, substantial regulatory legislation attached curtailing the political rights of the parties so classified. By casting such a wide net, the term 'foreign agent' was used to circumvent basic *European Convention* rights.

[Case of Kobaliya](#)



Poem for Friday

Echo

By Christina Rossetti (1830-1894)

Come to me in the silence of the night;
Come in the speaking silence of a dream;
Come with soft rounded cheeks and eyes as bright
As sunlight on a stream;
Come back in tears,
O memory, hope, love of finished years.

Oh dream how sweet, too sweet, too bitter sweet,
Whose waking should have been in Paradise,
Where souls brimfull of love abide and meet;
Where thirsting longing eyes
Watch the slow door
That opening, letting in, lets out no more.

Yet come to me in dreams, that I may live
My very life again tho' cold in death:
Come back to me in dreams, that I may give
Pulse for pulse, breath for breath:
Speak low, lean low,
As long ago, my love, how long ago.

Christina Georgina Rossetti, born on 5 December, 1830, was one of the foremost poets of her era. Her father, Gabrielle, was an Italian Poet, and later chair of Italian at King's College, in London. Her mother Frances Polidor, an Anglo-Italian, home schooled her children in a climate of intellectual excellence. From 1845 Christina, by then a prolific poet, suffered an illness, that some consider was at least influenced by mental illness. She continued to have bouts of serious illness throughout her life. Rossetti's poetry, included the collections *Goblin Market and other Poems* (1862), *The Prince's Progress* (1866), *A Pageant* (1881), and *The Face of the Deep* (1882). Christina Rossetti died on 29 December, 1894.

Stanford Chamber Chorale, conductor, Stephen M Sano, with Laura Dahl, pianist, sing Norman Dello Joio's **Come to Me, My Love**, a setting of Christina Rossetti's "Echo"

<https://www.youtube.com/watch?v=NyJs5oqyygs>



Reading by **Patricia Conolly**. With seven decades experience as a professional actress in three continents, Patricia Conolly has credits from most of the western world's leading theatrical centres. She has worked extensively in her native Australia, in London's West End, at The Royal Shakespeare Company, on Broadway, off Broadway, and widely in the USA and Canada. Her professional life includes noted productions with some of the greatest names in English speaking theatre, a partial list would include: Sir Peter Hall, Peter Brook, Sir Laurence Olivier, Dame Maggie Smith, Rex Harrison, Dame Judi Dench, Tennessee Williams, Lauren Bacall, Rosemary Harris, Tony Randall, Marthe Keller, Wal Cherry, Alan Seymour, and Michael Blakemore.

She has played some 16 Shakespearean leading roles, including both Merry Wives, both Viola and Olivia, Regan (with Sir Peter Ustinov as Lear), and The Fool (with Hal Holbrook as Lear), a partial list of other classical work includes: various works of Moliere, Sheridan, Congreve, Farquar, Ibsen, and Shaw, as well as roles such as, Jocasta in Oedipus, The Princess of France in Love's Labour's Lost, and Yelena in Uncle Vanya (directed by Sir Tyrone Guthrie), not to mention three Blanche du Bois and one Stella in A Streetcar Named Desire.

Patricia has also made a significant contribution as a guest speaker, teacher and director, she has taught at The Julliard School of the Arts, Boston University, Florida Atlantic University, The North Carolina School of the Arts, University of Southern California, University of San Diego, and been a guest speaker at NIDA, and the Delaware MFA program.

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