

Friday, 26 April 2024

## Weekly Banking Law Review Selected from our Daily Bulletins covering Banking

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### Executive Summary (One Minute Read)

**Clubb (administrator), in the matter of Town Tavern Blacktown Pty Limited (administrators appointed) (receivers and managers appointed) (FCA)** - the Court extended the date of the convening period for the second meeting of creditors for a group of companies in administration

**David William Pallas & Julie Ann Pallas as trustees for the Pallas Family Superannuation Fund v Lendlease Corporation Ltd (NSWCA)** - Court of Appeal declined to depart from previous authority that held that the Supreme Court does not have power to make so-called class closure orders in representative proceedings

## HABEAS CANEM

### Country smile



# Benchmark

## Summaries With Link (Five Minute Read)

### **Clubb (administrator), in the matter of Town Tavern Blacktown Pty Limited (administrators appointed) (receivers and managers appointed) [2024] FCA 405**

Federal Court of Australia

Halley J

Corporations - a company and five related entities comprised a corporate group that carried on a licensed hotel business in Western Sydney known as the Phoenix Town Tavern Blacktown - the Company leased premises in Blacktown and held assets necessary to conduct the business, including poker machines, gaming machine entitlements and licenses, financed motor vehicles, and bar equipment - Robin Hood Blacktown operated as a management services entity for the company - the assets of the companies comprising the group were intertwined, and the Company leased the premises but Robin Hood Blacktown conducted its operations - the company had a liquor licence, poker machine permit, and was the lessee pursuant to equipment lease agreements - members of the group (including the Company) entered into various agreements, including a subscription agreement and a further subscription agreement with Nomura Special Investments Singapore Pte Limited, to raise funds - in due course, Nomura issued notices of default and a demand for unpaid amounts - a security trustee appointed receivers and managers of all the assets and undertakings of the company and Robin Hood Blacktown, and then to all members of the group - the administrators sought, pursuant to s439A(6) of the *Corporations Act 2001* (Cth), that the date of the convening period as defined by s439A(5) of that Act, for the second meeting of creditors of required under s439A of the Act (Second Meeting) be extended - held: the object of Part 5.3A of the *Corporations Act* is to maximise the chance of a company continuing in existence, or, if that is not possible, obtain a better return for the company's creditors and members than would result from an immediate winding up - in exercising the jurisdiction to extend the convening period: (a) the Court is required to balance the interests of creditors in a timely administration; and (b) the need to allow sufficient time to administrators to carry out their functions properly and maximise the benefits to creditors through a proper administration - the extension sought would enable an orderly and comprehensive sales campaign to be undertaken consistently with the sale program developed by the receivers - it would also preserve the ability of the administrators to structure the sale of the group, including by way of a deed of company arrangement, which could not be utilised without the company remaining in administration - it would also enable the administrators to take advantage of the regime provided by Part 5.3A, in particular the moratorium on the enforcement of debts, the avoidance of liabilities that crystallise upon the company entering into liquidation, thereby allowing the administrators to retain its assets necessary to conduct the business - extension made as sought by the administrators.

[Clubb](#)

[From Benchmark Tuesday, 23 April 2024]

### **David William Pallas & Julie Ann Pallas as trustees for the Pallas Family Superannuation Fund v Lendlease Corporation Ltd [2024] NSWCA 83**

Bell CJ, Ward P, Gleeson, Leeming, & Stern JJA

Court of Appeal of New South Wales

Representative proceedings - plaintiffs were stapled securityholders of shares in Lendlease Corporation Ltd, an ASX-listed property and infrastructure company, which were stapled to units in the Lendlease Trust - they alleged that Lendlease breached its continuous disclosure obligations and engaged in misleading or deceptive conduct during a certain period during which approximately 445 million shares were traded - they complained about pre-tax provisions which they alleged Lendlease should have taken, and certain reductions in after-tax profits they alleged Lendlease should have made, with respect to three projects which it was undertaking - they commenced representative proceedings on behalf of all such shareholders - the trial judge stated a separate question to the Court of Appeal, namely that, notwithstanding previous authority, does the Supreme Court have power pursuant to sections 175(1), 175(5) and 176(1) of the *Civil Procedure Act 2005* (NSW) or otherwise to approve a notice to group members of the right to participate in any settlement of the proceedings or opt out of the proceedings, containing a particular notation - the previous authority referred to would compel a negative answer to this question - held: while intermediate appellate courts are not legally bound by their own earlier decisions, they should only depart from such authority or the authority of courts of co-ordinate jurisdiction within the national system if they are of the view that the decision in question is "plainly wrong" and, such an error having been identified, there are "compelling reasons" to depart from the earlier decision - the previous authority was no plainly wrong, although it may be accepted that the question is one upon which opinions might differ - there were also no compelling reasons to depart from that previous authority - the notice sought to be given sought what is commonly known as a "class closure order", that is, an order by which the class or group in a representative proceeding is wholly or partially restricted, and the rights of certain group members (generally, those who are unregistered) are extinguished irrespective of the fact that they do not participate in the fruits of any settlement - such an order would create an insoluble conflict of interest on the part of Lendlease in any mediation or settlement discussion - separate question answered in the negative.

[View Decision](#)

[From Benchmark Monday, 22 April 2024]

# Benchmark

## INTERNATIONAL LAW

### Executive Summary and (One Minute Read)

**Kirkorov v Lithuania** (Eur Ct HR) - Decision of Lithuania to deny entry to Russian entertainer on national security grounds did not amount to a violation of Article 10 (freedom of expression) of the *European Convention on Human Rights*

### Summaries With Link (Five Minute Read)

#### **Kirkorov v Lithuania, ECHR 096 (2024)**

European Court of Human Rights

Bårdsen P, Ilievski, Kuris, Yüksel, Schembri Orland, Krenc, & Derencinovic JJ

Kirkorov was a popular singer from Russia who had been found by the Lithuanian Migration Department to have publicly supported Vladimir Putin and supported Russia's actions in Crimea. The government of Lithuania placed Kirkorov on a list of aliens barred from entering the country. Kirkorov unsuccessfully challenged this decision in the Lithuanian courts. Kirkorov then brought proceedings before the European Court of Human Rights alleging that the actions of Lithuania violated his right to freedom of expression guaranteed by Article 10 of the *European Convention of Human Rights*. Article 10 provides that everyone has the right to freedom of expression without interference by public authority and regardless of frontiers. However, these rights may be subject to such restrictions as are prescribed by law "and are necessary in a democratic society, in the interests of national security' or public safety. The European Court found that, while the right of a foreigner to remain in a country is not a Convention right, 'immigration controls must be exercised consistently with Convention obligations'. The Court ruled that the ban on entry was materially related to the right of expression because, under Article 10, no distinction can be drawn between nationals and foreigners. As entry to Lithuania was denied on the basis of Kirkorov's past statements, the Court found that there had been an interference with his Article 10 rights. The issue came down to whether Lithuania's actions were permissible as being prescribed by law and necessary in the interests of national security. The Court found that Lithuania's actions were prescribed by law that purported to be based on national security. Nevertheless, it was for the courts to determine whether the invocation of national security had a reasonable basis or was contrary to common sense. The Court concluded that there had not been a violation of Article 10 in light of the careful scrutiny by the Lithuanian courts to the claim that Kirkorov represented a threat to national security. Further, the European Court held that the measures taken by Lithuania were not disproportionate and that the national courts had properly weighed the interests of national security against the measures taken against Kirkorov.

[Kirkorov](#)





## Poem for Friday

### The Song of a Comet

**By:** Clark Ashton Smith (1893-1961)

A plummet of the changing universe,  
Far-cast, I flare  
Through gulfs the sun's uncharted orbits bind,  
And spaces bare  
That intermediate darks immerse  
By road of sun nor world confined.  
Upon my star-undominated gyre  
I mark the systems vanish one by one;  
Among the swarming worlds I lunge,  
And sudden plunge  
Close to the zones of solar fire;  
Or 'mid the mighty wrack of stars undone,  
Flash, and with momentary rays  
Compel the dark to yield  
Their aimless forms, whose once far-potent blaze  
In ashes chill is now inurned.



A space revealed,  
I see their planets turned,  
Where holders of the heritage of breath  
Exultant rose, and sank to barren death  
Beneath the stars' unheeding eyes.  
A down contiguous skies  
I pass the thickening brume  
Of systems yet unshaped, that hang immense[67]  
Along mysterious shores of gloom;  
Or see—unimplicated in their doom—  
The final and disastrous gyre  
Of blinded suns that meet,  
And from their mingled heat,  
And battle-clouds intense,  
O'erspread the deep with fire.  
  
Through stellar labyrinths I thrid  
Mine orbit placed amid  
The multiple and irised stars, or hid,  
Unsolved and intricate,  
In many a planet-swinging sun's estate.





Of times I steal in solitary flight  
Along the rim of the exterior night  
That grips the universe;  
And then return,  
Past outer footholds of sidereal light,  
To where the systems gather and disperse;  
And dip again into the web of things,  
To watch it shift and burn,  
Hearted with stars. On peaceless wings  
I pierce, where deep-outstripping all surmise,  
The nether heavens drop unsunned,  
By stars and planets shunned.  
And then I rise  
Through vaulting gloom, to watch the dark  
Snatch at the flame of failing suns;  
Or mark  
The heavy-dusked and silent skies,[68]  
Strewn thick with wrecked and broken stars,  
Where many a fated orbit runs.  
An arrow sped from some eternal bow,  
Through change of firmaments and systems sent,



And finding bourn nor bars,

I flee, nor know

For what eternal mark my flight is meant.

**Clark Ashton Smith** was born on 13 January, 1893, in Long Valley, Placer County, California. Largely self-taught, he began writing at a very young age, acquiring an exceptionally large vocabulary by reading the dictionary from cover to cover. A protégé of the San Francisco poet George Sterling, Smith achieved recognition at the age of 19 for his collection of poems *The Star Treader* (1912), influenced by Baudelaire, Poe and Sterling. Smith always considered himself a poet first and foremost, however, following the Great Depression, he later turned to writing short stories for pulp magazines such as *Weird Tales* as this was a more lucrative source of income to support himself and his aging parents. He wrote more than 100 short stories between 1929 and 1934, and it is this, along with his friendship with fellow *Weird Tales* contributor H. P. Lovecraft, for which he is remembered today. Smith lived most of his life in Auburn, California, and passed away in his sleep on 14 August 1961, at the age of 68. In addition to his literary activities, he created a large number of drawings, paintings and sculptures which reflected the otherworldly atmosphere of his tales.

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