



Friday, 25 October 2024

## Weekly Business Law A Weekly Bulletin listing Decisions of Superior Courts of Australia covering Business Law

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### Executive Summary (One Minute Read)

**Kmart Australia Limited v Marmara** (NSWCA) - appeal dismissed against a judgment holding Kmart liable in negligence when a bulky item fell from one customer's trolley onto another customer

**Property Developments (WA) Pty Ltd v Lord Forrest Nominees Pty Ltd** (WASC) - a contractual date for compliance with a condition did not state a time, and, on the contract's proper construction, the time expired at midnight

## HABEAS CANEM

### Habeus Halloween



## Summaries With Link (Five Minute Read)

### **Kmart Australia Limited v Marmara [2024] NSWCA 249**

Court of Appeal of New South Wales

Kirk & McHugh JJA, & Griffiths AJA

Negligence - the respondent was injured when a large box containing a mountain bike fell on her from behind while she was at the self-checkout section of the Kmart store at Woy Woy - Kmart was the occupier of that store, had control of the activities conducted at the store, and admitted it owed the respondent a duty of care as the occupier - the primary judge found that Kmart had breached its duty of care, causing the respondent to suffer personal injury, and awarded damages of about \$625,000 - Kmart appealed regarding both breach and causation - held: the primary judge had not erred in admitting the report of an occupational health and safety expert into evidence - the admissibility of opinion evidence is to be determined by application of the *Evidence Act 1995* (NSW), rather than by parsing statements in decided cases divorced from the context in which those statements were made - the question under s79 is whether the opinion is "wholly or substantially based on" the witness's "specialised knowledge", not whether that is made explicit on the face of the expert's report - the mere fact that an opinion is based in part on a process of reasoning that involves common or ordinary knowledge is not a bar to admissibility under s79, provided that the opinion is substantially based on specialised knowledge - the primary judge had not erred in her findings regarding Kmart's system to assist customers with heavy or bulky items, nor found that no such system was in place - the risk of harm should be characterised as the risk of physical injury by heavy, oversized items such as mountain bikes in boxes tipping or falling from customers' shopping trolleys - Kmart's system for assisting customers with heavy or bulky items was initiated by individual customers, with respect to their own purchases, if it occurred to them to ask for assistance and they chose to take it, and the service was not drawn to customers' attention by signage, and there was no suggestion in the evidence it was a mandatory system for transporting heavy, oversized items out of the store - the primary judge did not err in finding that the "system in place to assist customers with large or heavy purchases" was not a sufficient precaution against the risk of harm - considering the matters in s5B(2) of the *Civil Liability Act 2002* (NSW), the evidence established that Kmart breached its duty of care to the respondent - Kmart's negligence was a necessary condition of the occurrence of the harm within the meaning of s5D(1)(a) of the *Civil Liability Act* - appeal dismissed.

[View Decision](#)

[From Benchmark Wednesday, 23 October 2024]

### **Property Developments (WA) Pty Ltd v Lord Forrest Nominees Pty Ltd [2024] WASC 388**

Supreme Court of Western Australia

Archer J

Contracts - the first defendant operated a business trading as the 'Hotel Lord Forrest' - the first defendant agreed to sell the business to the plaintiff - settlement was subject to the plaintiff obtaining approval for the transfer of the business' liquor licence by a certain date, and the first

# Benchmark

defendant was obliged to cooperate with the plaintiff to obtain this approval - the parties agreed to extend the date for approval to another date, without mentioning any time on that date - at 5:18pm on that date, the plaintiff had not obtained approval, and the first defendant sent a termination notice - the plaintiff contended that the notice was invalid because the date by which approval was to be obtained did not finish until midnight - the defendants contended the time for the plaintiff to obtain approval finished at 5pm, and, further, under a clause in the contract, notices emailed after 5pm were deemed to be received on the next business day, so the notice was therefore valid in any event, and they had also sent a second termination notice ten days later - the defendants sought summary judgment - held: the defendants had to establish a high degree of certainty that they would succeed at trial - although it is a matter of construction in each case, ordinarily, where a date and not a time is specified for the fulfilment of an obligation, the time will expire at midnight there was nothing in the text, context or purpose of the contract to indicate that the time would expire at 5pm, and a reasonable businessperson would not have understood the time would expire at 5pm - the Court was not satisfied to a high degree of certainty that the clause deeming emails sent after 5pm to be received on the next business day applied to the email attaching the first termination notice - the first termination notice was invalid due to it being sent before midnight - the duty on the first defendant to cooperate did not cease to operate after the date for obtaining approval - therefore, the second termination notice was also invalid - application for summary judgment dismissed.

[Property Developments \(WA\) Pty Ltd](#)

[From Benchmark Friday, 25 October 2024]

# Benchmark

## INTERNATIONAL LAW

### Executive Summary and (One Minute Read)

**In the Matter of McAleenon (UKSC)** - Supreme Court held that an individual had the right to compel judicial review of a government decision relating to landfill contamination even though a private right of action against the alleged polluter may have been available

### Summaries With Link (Five Minute Read)

**In the Matter of McAleenon [2024] UKSC 31**

Supreme Court of the United Kingdom

Lord Lloyd-Jones, Lord Briggs, Lord Sales, Lord Stephens, & Lady Simler

Noeleen McAleenon resided near a landfill that was operated by a private firm. Ms McAleenon maintained that the Lisburn and Castlereagh Council had regulatory authority concerning nuisances like the landfill. She sought judicial review of how the Council had dealt with complaints about the landfill. The government argued that she could not seek judicial review of the Council's actions because she had available to her a private right of action against the alleged polluter. The Court of Appeal sustained this objection and held that there were suitable alternative remedies available to Ms McAleenon and that judicial review was not available to her. The Supreme Court reversed and found that the existence of a private claim in nuisance against the alleged polluter did not constitute a suitable alternative remedy to judicial review of the Council's conduct. The Court stated that the fact that different proceedings could have been brought against another party did not mean that there existed a suitable alternative so as to preclude judicial review. The Court further stated that it is not the courts' role to say that a claimant should have sued someone other than the branch of government whose actions were being questioned.

[In the Matter of McAleenon](#)

## Poem for Friday

### Life

By Charlotte Brontë (1816-1855)

LIFE, believe, is not a dream  
So dark as sages say;  
Oft a little morning rain  
Foretells a pleasant day.  
Sometimes there are clouds of gloom,  
But these are transient all;  
If the shower will make the roses bloom,  
O why lament its fall ?

Rapidly, merrily,  
Life's sunny hours flit by,  
Gratefully, cheerily,  
Enjoy them as they fly !

What though Death at times steps in  
And calls our Best away ?  
What though sorrow seems to win,  
O'er hope, a heavy sway ?  
Yet hope again elastic springs,  
Unconquered, though she fell;  
Still buoyant are her golden wings,  
Still strong to bear us well.  
Manfully, fearlessly,  
The day of trial bear,  
For gloriously, victoriously,  
Can courage quell despair !

**Charlotte Brontë** was born on 21 April 1816, in West Yorkshire, UK. She was an English poet and novelist. She was the eldest of the three Brontë sisters. Her siblings were Emily Brontë, Anne Brontë, Branwell Brontë, Elizabeth Brontë, and Maria Brontë. She had a year of formal education at Clergy Daughters' School at Cowan Bridge. Thereafter she and her siblings learned at home, from each other and their parents, and aunt Elizabeth Branwell who lived with the family. She is famous for her novel *Jane Eyre*, which she first published under the pseudonym Currer Bell in 1847. She was married to Arthur Bell Nicholls from 1854 to 1855, for the last 9 months of her life. Nicholls had been the curate



to Charlotte's father, Patrick Brontë, an Anglican clergyman. Charlotte Brontë died on 31 March 1855 in Haworth, England.

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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