

Friday, 15 December 2023

## Weekly Civil Law Review

Selected from our Daily Bulletins covering Insurance, Banking,  
Construction & Government

### Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

### Executive Summary (One Minute Read)

**Court House Capital Pty Ltd v RP Data Pty Limited** (FCAFC) - costs order against litigation funder upheld by the Full Court (I B)

**Environment Council of Central Queensland Inc v Minister for the Environment and Water (No 3)** (FCA) - costs followed the event in the usual way where the Environment Council had failed in public interest environmental litigation (I B C)

**Rheem Australia Pty Ltd v Mitsui Sumitomo Insurance Company Ltd** (FCA) - Machinery Breakdown endorsement in industrial special risks policy applied to require the insurer to indemnify the insured (I B)

**Witron Australia Pty Ltd v Turnkey Innovative Engineering Pty Ltd** (NSWCA) - an email from a principal to a contractor did not give sufficient reasons for refusal to pay to constitute a payment schedule under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (I B C)

**Dahdah v Witte** (NSWCA) - trial judge had erred in holding that plaintiff seeking leave to commence proceedings out of time under the *Motor Accidents Compensation Act 1999* (NSW) had failed to give a full and satisfactory explanation of the delay (I B)

**Anderson v Canaccord Genuity Financial Ltd** (NSWCA) - High Court authority required the conclusion that two employees had owed fiduciary obligations to their employer - they had breached that duty, and two other companies had provided knowing assistance (B I)



**Property Holdings Group Pty Ltd v Rosehill Panorama Pty Ltd (Administrators**

**Appointed)** (NSWSC) - deed granted charge to secure payment of a development fee under that deed - development fee did not become payable due to Panorama's breach - charge did not secure obligation to pay damages - equitable maxims do not have a simple at large operation (B C I)

**Kvelde v State of New South Wales** (NSWSC) - Supreme Court partially struck down laws prohibiting protest activity at major facilities, under the Commonwealth Constitution's implied freedom of political communication (B C I)

**In the matter of West Homes Australia Pty Ltd** (VSC) - company that had failed to comply with a statutory demand was refused leave to oppose winding up on the grounds of solvency and the existence of a genuine dispute about the debt (B I)

**Re Haidi Holdings Pty Ltd** (VSC) - Court refused application to set aside statutory demand based on unpaid present entitlements between related trustee companies, where one of those companies was now under the control of liquidators (I B)

**Thallon Mole Group Pty Ltd v Morton; Morton v Thallon Mole Group Pty Ltd** (QCA) - builder and contractor both failed in appeals against decision of primary judge regarding building contract (I B C)

**Le v Plummer** (WASCA) - primary judge had been correct to hold that a pleading of malicious prosecution was deficient as to each of the necessary elements (I)

**Nova Builders Pty Ltd v Beno Excavations Pty Ltd (No 4)** (ACTSC) - builder was entitled to a quantum meruit where the building contracts had been discharged by agreement (I B C)

## HABEAS CANEM

McGregor wishes you a happy and peaceful holiday season



## Summaries With Link (Five Minute Read)

### **Court House Capital Pty Ltd v RP Data Pty Limited [2023] FCAFC 192**

Full Court of the Federal Court of Australia

Charlesworth, Sarah C Derrington, & Raper JJ

Litigation funding - Hardingham was a professional photographer, who, together with his company REMA, was commissioned by various real estate agencies to produce photographs and floor plans for use in marketing campaigns for the sale or lease of properties, including by upload onto the realestate.com.au platform - the photos and floorplans were maintained after completion of the sale or lease and were made available to subscribers and provided under contract to RP Data for publication via its website - Hardingham and REMA contended that the licence given to the agencies to use the photographs and floor plans was limited, and RP Data had infringed copyright by publishing them on its website - Hardingham and REMA entered into a litigation funding agreement with Court House Capital, and then commenced proceedings - the primary judge dismissed the claim - Hardingham and REMA were ordered to pay RP Data's costs - RP Data then sought that Court House be jointly and severally liable for those costs - the primary judge found that Court House and its activities had a sufficient connection with the principal proceedings for it to be appropriate that a costs order be made against it - Court House appealed - held: s43 of the *Federal Court of Australia Act 1976* (Cth) empowers this Court with a broad, discretionary power to award costs where that discretion is to be exercised judicially and in accordance with general principles pertaining to the law of costs - the power extends to making costs orders against non-parties - the power to order costs against a third party will only be exercised in circumstances where a non-party has a connection to the litigation which is sufficient to warrant the exercise of power - there is no rigid checklist of factors which may be taken into account, and the determination of the nature and extent of the relevant connection will be informed by the character of the non-party - the primary judge had not erred in determining that the absence of an application for security for costs did not preclude the making of the costs order - a third-party costs order is not only made where the conduct of the litigation was unreasonable or improper or comprised an abuse of process - unreasonable or improper conduct of proceedings is a relevant, but not necessary, criterion for the making of non-party costs orders - where a litigation funder has a commercial interest in proceedings, even if it has no control over the proceedings, the requisite connection may nonetheless be established and an adverse costs order made against the funder - Court House facilitated the litigation for its own personal gain, it agreed to fund the litigation and funded senior counsel's fees, and Hardingham and REMA were required to consult with Court House on any issues arising from the conduct or progress of the proceedings and they could not compromise the claim without prior consultation with and consent from Court House - Court House sought to profit, not only by reimbursement of the funds it had outlaid in the proceedings, but also for a 15% uplift on any damages obtained - appeal dismissed.

[Court House Capital Pty Ltd \(I B\)](#)

[From Benchmark Tuesday, 12 December 2023]



**Environment Council of Central Queensland Inc v Minister for the Environment and Water (No3) [2023] FCA 1532**

Federal Court of Australia

McElwaine J

Costs in public interest environmental litigation - coal miners applied to the Commonwealth Minister for the Environment and Water to extend their operations - the Minister's delegate determined that the proposed actions were controlled actions under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) - the proposed actions were approved at the State level pursuant to the Bilateral Agreement provisions in Part 5 of the Act - after a request by the Environment Council, the Minister decided not to revoke her decisions, as she was not satisfied that the proposed actions would cause any net increase in greenhouse gas emissions, and that, even if they would, the likely increase in global greenhouse gas emissions would be very small so that she could not conclude that the proposed actions would be substantial causes of adverse impacts on the world heritage values of declared World Heritage properties - the Environment Council sought judicial review of these decisions - the Court dismissed the application, rejecting the submission that it was not open to the Minister to engage in counter-factual reasoning by netting off likely emissions from the proposed actions from total global emissions from other sources in a hypothetical world where the controlled actions did not occur (see Benchmark 13 October 2023) - the mining companies sought costs, and the Minister sought her costs discounted by 50% - the Environment Council said costs should not follow the event on the basis that this was public interest litigation - held: sometimes public interest litigation of itself provides a basis to depart from the usual order as to costs - the Environment Council brought each proceeding in the public interest and, beyond satisfaction of achieving the outcome that it argued for, did not have a financial or proprietary interest that it sought to vindicate - the application raised an important question of statutory construction, with wide-ranging implications - however, the arguments in support of the construction of "likely" at s 78(1)(a) of the *Environment Protection and Biodiversity Conservation Act* were contrary to guiding authority - the central "future universe" contention, under which the Minister had to reason prescriptively by identifying possible futures and future worlds "starting with the input assumption that the action will be taken", was inconsistent with the broad discretion to assess the impacts of a particular proposed action - the precautionary principle argument could not be reconciled with a recent decision of the Full Court - the irrationality contentions failed to meet the high bar for that finding - the Environment Council had placed a large volume of scientific evidence before both the Minister and the Court, which was extraneous to the issues in dispute, as the Minister did not dispute the science of climate change, accepting that anthropogenic greenhouse gas emissions are the major cause of adverse climate change and an existential threat to a large number of Matters of National Environmental Significance - the *Hardiman* principle (that the interests of the Minister could not be distinguished from the public interest, and she ought to have played a more limited role where the mining companies were contradictors) was not applicable - where a Minister's decision is challenged on judicial review, the ordinary course is that the Minister is represented by counsel and takes an active part - even though the mining companies acted as a competent contradictor, the Minister had a



proper interest in the determination of the construction of her statutory powers - the Minister had appropriately proposed a discount of 50% of her costs to reflect the extent of her interest - costs should follow the event in the usual way, with the Minister's costs discounted by 50% as the Minister had proposed.

[Environment Council of Central Queensland Inc](#) (I B C)

[From Benchmark Monday, 11 December 2023]

## **Rheem Australia Pty Ltd v Mitsui Sumitomo Insurance Company Ltd [2023] FCA 1570**

Federal Court of Australia

Jackman J

Insurance - Rheem manufactures and supplies commercial and residential hot water systems and some solar products - an electrical arcing event occurred in a main switchboard at its Rydalmere manufacturing premises, causing a power outage - Rheem claimed indemnity for the costs of a temporary switchboard and repairs, costs of a replacement switchboard, and additional costs of working, under an industrial special risks insurance policy issued by the respondent insurers - a Machinery Breakdown endorsement to the policy provided that the insured was indemnified against any sudden and unforeseen loss, destruction of or damage to Property Insured which manifests itself at the time of its occurrence and necessitates immediate repair and/or replacement to enable ordinary working to be continued - the policies included exclusion clauses excluding "[a]ny electric wiring and fittings associated with lighting and power circuits" - however, this exclusion clause was subject to a Fusion endorsement, which provided that the exclusion clause did not apply to "the actual burning out by electric current of any part or parts of electrical machines, installations or apparatus other than rectifiers, radio, television amplifying or electronic equipment of any description, lighting or heating elements, fuses or protective devices or electrical contacts at which sparking or arcing occurs in ordinary working" - the insurers denied indemnity - Rheem commenced proceedings - held: insurance policies are a kind of commercial contract which should be construed according to the principles of businesslike interpretation which are applicable to commercial contracts generally - words and phrases used in a contract are usually given their ordinary meaning, unless there is a good reason to depart from that approach, such as where the term is intended to be used as a term of art rather than in its popular sense - the insuring clause and any exclusion clause must be read together in a harmonious way so that due effect is given to both, and the right conferred by the former is not negated or rendered nugatory by the construction adopted for the latter - an exclusion clauses is to be construed according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause contra proferentem as a last resort in case of ambiguity - a harmonious construction of the words "electric wiring" within the Machinery Breakdown endorsement as a whole pointed strongly in favour of Rheem's preferred construction, namely that the term "electric wiring" means cables or wires in an electrical system or installation, but not a component which does not have cables or wires within it and is not itself cabling or wiring - the Machinery Breakdown endorsement applied - the insurer's preferred construction was correct regarding the exclusion

clause and the Fusion endorsement - parties to have an opportunity to seek to resolve the remaining issues in the proceedings concerning causation and quantification of loss, and, if they are unable to do so, to give consideration to the steps which should be taken for the resolution of those issues.

[Rheem Australia Pty Ltd](#) (I B)

[From Benchmark Wednesday, 13 December 2023]

## **Witron Australia Pty Ltd v Turnkey Innovative Engineering Pty Ltd [2023] NSWCA 305**

Court of Appeal of New South Wales

Leeming, Payne, & Kirk JJA

Security of payments - Witron Australia Pty Ltd contracted Turnkey Innovative Engineering Pty Ltd to carry out electrical installation works, being the installation of a series of group controls, at an automated distribution centre being constructed at Kemps Creek - the contract stipulated "a flat fixed price" of \$11.4 million (excluding GST) for a defined scope of work, subject to "any increase or decrease arising from variations as mutually agreed by the parties" - the works were delayed, and the Witron sent Turnkey an email removing a number of areas from the scope of works under the contract - the contractor sought to re-price the works at about \$14 million on the basis of additional works said to be outside the scope of the contract and not due to the fault of the contractor - there was an exchange of emails that appeared to constitute agreement to this variation - Turnkey served on Witron a number of variation claims - Turnkey then served a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) - in response, Witron sent an email to Turnkey stating that it would review the proposed variations after it saw progress in handing over certain areas, and stating that Turnkey should claim progress based on the original contract price, and asking that Turnkey adjust its claim accordingly - Turnkey contended that, as Witron provided no payment schedule, it was liable to pay the amount claimed in the payment claim - the principal contended that the email had constituted a payment schedule - the primary judge held the email was not a valid payment schedule, and Turnkey was entitled to judgment (see Benchmark 22 August 2023) - Witron appealed - held: under s14(2) and (3) of the Act, a payment schedule must identify the payment claim to which it relates, must indicate the amount of the payment (if any) that the respondent proposes to make, and, if the amount proposed to be paid is less than the claimed amount, must indicate why it is less and, if it is less because the respondent is withholding payment for any reason, the respondent's reasons for withholding payment - if a response to a payment claim does not satisfy these requirements then it is not a payment schedule within the meaning of the Act and the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment - a payment schedule need not be a formal document and need not identify itself as a payment schedule - the requirement in s14(3) that a payment schedule contain reasons is not concerned with the adequacy or sufficiency of the reasons given, in the sense of making out a good answer to the claim, and that is a matter for the adjudicator if the dispute progresses that far - however, in general, a failure to provide any reason or reasons directed to a distinct and substantial component of a payment claim will constitute a failure sufficiently to indicate why the scheduled amount is less than the amount

claimed - for Witron to say "we are not going to consider paying this until you do X" was, of itself, to refuse to grapple with the claim made - it was not saying that the claim was not payable, it was simply declining to consider whether or not that were so, and did not give reasons for rejecting the claim, and did not serve to apprise Turnkey of the real issues in dispute - appeal dismissed.

[View Decision](#) (I B C)

[From Benchmark Thursday, 14 December 2023]

## **Dahdah v Witte [2023] NSWCA 304**

Court of Appeal of New South Wales

White & Mitchelmore JJA, & Griffiths AJA

Motor accidents compensation - the applicant alleged he suffered injuries in a motor vehicle collision caused by the negligence of White - the accident occurred in April 2017, but the applicant did not consult his GP in relation to the injury allegedly sustained in the accident until October 2019, which he explained on the basis that he expected that his symptoms would resolve - the GP provided a medical certificate, which the applicant submitted to his insurer, who forwarded it to White's insurer - the insurer provided a report from a doctor that concluded that the applicant did not suffer any significant injury in the motor vehicle accident and that his reported restrictions on working and ability to perform pre-accident home duties were due to prior and subsequent medical conditions unrelated to the accident - the applicant commenced proceedings in the District Court for damages, outside the three year limitation period under s109(1) of the *Motor Accidents Compensation Act 1999* (NSW) - the primary judge refused leave to commence the proceedings out of time, finding that the applicant had not given a full and satisfactory explanation for his delay - the applicant sought leave to appeal - held: an explanation for delay will be "full" if it provides a complete account of the actions, knowledge, and beliefs of the claimant from the date of collision until the date of providing the explanation - this does not call for perfection nor require the claimant to recount every moment that has elapsed within that period - the content of a full explanation is informed by its purpose, namely to enable a judgment as to whether the explanation is satisfactory - many reasonable persons in the position of the applicant would consider that, as the insurer had accepted their explanation for the delay in making the claim and had foreshadowed making an offer of settlement, they need do no more than wait for the offer to arrive - it was reasonable for the applicant to consider that The insurer was there to help him (as it had done in assisting him in making the claim) and to assume that he did not need to seek legal advice - the primary judge had erred in concluding that the applicant had not provided a full and satisfactory explanation for the delay in commencing proceedings - it was not possible on this application to disentangle the issue of the extent to which the different medical conditions from which the applicant suffers contributed to the loss of earnings which his business would otherwise have received - to satisfy the threshold requirement in s109(3)(b) of the *Motor Accidents Compensation Act*, it is not necessary to find that it is more probable than not that his damages would exceed the threshold amount - it is sufficient that it is shown that there is a real or substantial chance that he would receive more than that amount - having regard to the evidence, and the conservative nature of assumptions

made by one expert witness, the Court was satisfied that there is at least a real or substantial chance that his damages would exceed the threshold - leave to appeal granted and appeal allowed, and the applicant given leave to commence proceedings.

[View Decision](#) (I B)

[From Benchmark Thursday, 14 December 2023]

## **Anderson v Canaccord Genuity Financial Ltd [2023] NSWCA 294**

Court of Appeal of New South Wales

Gleeson, Leeming, & White JJA

Fiduciary duties - Anderson was the assignee of claims by the liquidator of two companies within the Ashington group of companies - those companies conducted a business involving acquiring, redeveloping and selling high-end residential/commercial/retail properties, with the aim of generating large returns for substantial investors - Garrett was the Head of Funds Management at Ashington and Renauf was the Head of Acquisitions at an Ashington company - Anderson contended that Garret and Renauf and others had taken away the business of the Ashington group by engineering the replacement of Ashington companies as trustee or manager of each of a number of superannuation trusts - the primary judge held that (1) Garrett and Renauf had acted dishonestly and fraudulently against their employer, but that they did not owe fiduciary duties; (2) if the dishonest breaches of duty had been breaches of fiduciary duty, none of the other defendants had knowingly assisted in those breaches; (3) although Garrett and Renauf's conduct had caused a particular capital raising to fail; the damages of compensation payable was nil - Anderson appealed - held: on binding High Court authority, employees are an accepted category giving rise to fiduciary duties - the scope of the fiduciary obligation must be separately considered in each case - in this case Garrett and Renauf had breached their fiduciary duties - their fiduciary obligations extended to the performance of the capital raising that had failed, where they had to act in the interests of the Ashington companies, and could not act self-interestedly to remove the existing trustee and manager, to be replaced by entities in which they had an interest - there will be knowing assistance where, but for the action or inaction of the third party, the breach of fiduciary duty would not have occurred, and there may also be assistance where the third party has facilitated a breach of fiduciary duty that would have occurred in any event - an act done when an employee is on a "frolic" of his or her own will not fall within the vicarious liability of the employer, but this does not answer the relevant question when considering whether an employer assisted in a breach of fiduciary duty, which is whether the conduct and especially the knowledge of the employee is to be imputed to the employer - in this case, the employee was acting within the scope of his actual or apparent authority when initial meetings took place that were critical to the effectuation of Garrett and Renauf's purpose - to the extent there is a fraud exception for the imputation of knowledge which applies in a claim for knowing assistance, it did not disentitle Anderson from imputing to the employer the knowledge of the employee at least at those early meetings, because the employee was acting within the scope of his actual or apparent authority - even at that early stage it should have been clear to the employee that Garrett and Renauf were engaged in a dishonest and fraudulent breach of fiduciary duty - the relevant employers had knowingly

assisted the breach of fiduciary duty - regarding equitable compensation, when valuing a lost opportunity, it is necessary to have regard to future possibilities, even possibilities which are unlikely to eventuate, so long as they are not so vanishingly improbable that they may be ignored - the primary judge had erred by relying on an expert opinion to conclude that the value of the lost opportunity was nil - a court when called upon to assess the value of an opportunity which is subject to multiple contingencies may assess those contingencies on a global basis, or by assessing each contingency separately - here a global approach was appropriate - Anderson was entitled to judgment for about \$1.59 million against Garrett, Renauf, and the two companies who had knowingly assisted the breach of fiduciary duty, plus interest of about \$1.4million - no respondent had suggested liability to pay equitable compensation for breach of fiduciary duty of a dishonest and fraudulent kind, or for knowing involvement in those breaches, was an apportionable claim for the purposes of the proportionate liability legislation - appeal allowed.

[View Decision](#) (B I)

[From Benchmark Monday, 11 December 2023]

## **Property Holdings Group Pty Ltd v Rosehill Panorama Pty Ltd (Administrators Appointed) [2023] NSWSC 1492**

Supreme Court of New South Wales

Robb J

Equity - PHG had options to acquire properties a residential and commercial development, and was negotiating for the purchase of another property - by a deed of assignment, PGH assigned the options and its position as prospective purchaser to Panorama, and Panorama was required to lodge a development application generally in accordance with a scheme prepared by ADS, pursue that application with Council, and pay a development fee to PHG - Panorama's development application varied significantly from the ADS scheme - Council refused consent - the development fee was not payable as Panorama had not lodged an application generally in accordance with the ADS scheme - PHG claiming that the deed granted it an equitable charge over the properties to secure an amount equal to the development fee - held: Panorama had breached the deed, because it failed to lodge and pursue a development application generally in accordance with the ADS scheme - if Panorama had complied with the deed, it would probably have gained development consent in the form of the an amended scheme substantially in accordance with the ADS scheme - PHG was entitled to damages to compensate it for the loss of opportunity to be paid the development fee - a clause in the deed explicitly created a charge pending payment of the development fee on options, contracts to purchase properties, and purchased properties - the obligation secured by the charge was the obligation to pay the development fee, and not the obligation to pay damages - the equitable maxim that equity regards as done that which ought to be done, and the common law principle, followed by equity, that a party to a contract will not be permitted to take advantage of its own wrong, do not operate at large - regarding the maxim that equity regards as done that which ought to be done, the actual doctrine in equity underpinning the validity of the charge was that an assignment for value of future property binds the property itself when it is acquired, automatically on the happening of the event, without any further act on the part of the assignor,

and is not merely a right in contract - however RPG wanted to create a fiction that Panorama should be treated as if it had performed its contractual obligation to enliven the obligation to pay the development fee, that is, for the equitable doctrine to create both the charge and the debt - where a contract to assign or charge is supported by consideration, equity assumes that the assignment has been made or the charge created when the property vests in the assignor or chargor, where the only thing left to be done is the formal assignment or creation of the charge, and the performance of that obligation is not conditional on events that have not occurred - where the performance of that obligation is conditional on events that have not occurred, equity does not go further and assume that those events have occurred - as to the principle that a party to a contract will not be permitted to take advantage of its own wrong, there is no substantive principle that, in all cases where the effect of a breach of contract is that a state of affairs is not established that would entitle the innocent party to some benefit, that the innocent party will be entitled to that benefit because the defaulting party's wrong disentitles it from relying on the absence of the necessary state of affairs - where the innocent party is entitled to a benefit that depends upon an event that the contract requires the defaulting party to achieve, the wrong of the defaulting party does not automatically entitle the innocent party to the benefit in specie, as opposed to damages for breach of the contract - PGH was entitled to damages, but not to enforce the charge to secure those damages.

[View Decision](#) (B C I)

[From Benchmark Monday, 11 December 2023]

## **Kvelde v State of New South Wales [2023] NSWSC 1560**

Supreme Court of New South Wales

Walton J

Constitutional law - the *Roads and Crimes Legislation Amendment Act 2022* (NSW) introduced s214A into the *Crimes Act 1900* (NSW) - s214A(1) provided that a person must not enter, remain on or near, climb, jump from or otherwise trespass on or block entry to any part of a major facility if that conduct (a) causes damage to the major facility, (b) seriously disrupts or obstructs persons attempting to use the major facility, (c) causes the major facility, or part of the major facility, to be closed, or (d) causes persons attempting to use the major facility to be redirected - a number of railway stations, ferry and passenger terminals, and infrastructure facilities were prescribed as major facilities - the amending Act also made amendments to s144G of the *Roads Act 1993* (NSW), to prohibit similar conduct regarding the Sydney Harbour Bridge or any other major bridge, tunnel or road - r48A(1) of the *Roads Regulation 2018* (NSW) was amended to provide that any bridge or tunnel in the Greater Sydney Region, the City of Newcastle, or the City of Wollongong, or any bridge or tunnel that joins a main road, a highway, or a freeway, was prescribed major bridge or tunnel - the plaintiffs sought declarations that s214A and r48A(1) were invalid under the implied freedom of political communication in the Commonwealth Constitution - held: the plaintiffs invoked federal jurisdiction under s76(i) of the Constitution in any matter "arising under this Constitution, or involving its interpretation", which may be exercised by the Supreme Court under s39(2) of the *Judiciary Act 1903* (Cth) - the plaintiffs had standing as they were persons who had attended, organised, promoted, and

planned many protest actions, and their freedom of action had been particularly affected by the impugned laws - there is a three-part test to establish whether a law contravenes the implied freedom: (1) does the law effectively burden the implied freedom in its terms, operation or effect? (2) if so, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? (3) if so, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? - protests over environmental issues do, as a general proposition, constitute political communication - the implied freedom extends beyond expressive conduct that a "hypothetical ordinary member of the community" may consider to be "reasonable" - the effective burden imposed by s214A was not so slight as to be inconsequential, insofar as it proscribed conduct of entering, remaining on or near a major facility which causes the partial closure of major facilities (contrary to part of s214A(c)) or persons attempting to use the major facility to be redirected (contrary to s214A(d)) - the purpose of these provisions was legitimate - however, those provisions were not reasonably necessary, as an alternative proposed by the plaintiffs would have achieved effectively the same objectives while imposing a significantly lesser burden upon the implied freedom - the adverse effect of s214A(1)(c) and (d) on the implied freedom in terms of deterring otherwise lawful protests significantly outweighed the benefit sought to be achieved by more effectively deterring any conduct that may disrupt major facilities - s214A(1)(c) was therefore partially invalid, and the invalid part could be the subject of partial disapplication - s214A(1)(d) was invalid, and could be severed - the challenges to the balance of s214A and r48A(1) failed - declarations made that s214A(1)(c) was invalid to the extent that it makes it an offence for persons engaged in the conduct to cause part of the major facility to be closed, and that s214A(1)(d) was invalid.

[View Decision](#) (B C I)

[From Benchmark Friday, 15 December 2023]

## **In the matter of West Homes Australia Pty Ltd [2023] VSC 732**

Supreme Court of Victoria

Irving AsJ

Corporations - the plaintiff applied to have West Homes Australia Pty Ltd wound up after failure to comply with a statutory demand - West Homes sought leave to oppose the winding up application, as it disputed the existence and quantum of the debt West Homes also asserted that it was solvent - held: s495 of the *Corporations Act 2001* (Cth) provides that, on an application for a company to be wound up in insolvency on the basis of failure to comply with a statutory demand, the company may not, without leave of the Court, oppose the application on a ground that the company relied on for the purposes of an application by it for the demand to be set aside; or that the company could have so relied on, but did not (whether it made such an application or not) - further, the Court is not to grant leave unless it is satisfied that the ground is material to proving that the company is solvent - in considering whether to grant leave, the Court must give preliminary consideration to the company's basis for disputing the debt, examine the reason why the issue of indebtedness was not raised in an application to set aside the statutory

demand and the reasonableness of the party's conduct at that time, and investigate whether the dispute about the debt is material to proving the company is solvent - the Court must be provided with the 'fullest and best' evidence of solvency, and unaudited accounts and unverified claims of ownership or valuation are not ordinarily probative in this regard - nor are mere assertions of solvency arising from a general review of the accounts, even if made by qualified accountants who have detailed knowledge of how those accounts were prepared - West Homes was presumed insolvent unless it could prove that it is able to pay its debts as and when they become due and payable - West Homes was not trading, it was clearly not a dormant company - in October 2023 it was a plaintiff in Supreme Court proceedings in which interlocutory costs orders were made against it - the financial reports provided to the Court made no reference to the costs order, and contained no historical information to explain when and in what circumstances West Homes ceased trading - West Homes had not discharged its burden of proving solvency such as to displace the presumption of its insolvency - it was therefore not strictly necessary to decide whether there was a genuine dispute about the existence or quantum of the debt - however, the Court was not satisfied that there was such a genuine dispute, even on a preliminary basis - there was no dispute between that the statutory demand had been served on West Homes at its registered address - there was some dispute about whether the *Masri* principle remained good law, that is, the principle that, where the directors of a company did not become aware of the existence of the statutory demand until after the expiration of the 21-day period for filing of an application to set aside a statutory demand, and they acted reasonably with respect to the collection of mail within their registered office, fairness requires the company be permitted to raise a ground available to challenge the demand - in the Court's view, the *Masri* principle was no longer good law and, even if it were, on the facts of this case the mail collection system at the registered office was not reasonable - leave to oppose the winding up application on the asserted grounds refused.

[In the matter of West Homes Australia Pty Ltd](#) (B I)

[From Benchmark Tuesday, 12 December 2023]

## **Re Haidi Holdings Pty Ltd [2023] VSC 739**

Supreme Court of Victoria

Hetyey AsJ

Corporations - Haidi Holdings Pty Ltd and Tesoriero Investment Group Pty Ltd (in liq) were related entities, having a common director and shareholder - they were both trustees of different trusts - Tesoriero Investment Group was wound up in insolvency - Tesoriero Investment Group, now under the control of liquidators, served a statutory demand on Haidi in respect of two unpaid present entitlements distributed by Haidi as trustee of the John Tesoriero Family Trust to Tesoriero Investment Group, but not yet paid - Haidi sought to have the statutory demand set aside on the bases of a genuine dispute under s459H(1)(a) of the *Corporations Act 2001* (Cth), two offsetting claims under s459H(1)(b), and "some other reason" under s459J(1)(b), including that it was an abuse of process and had not been withdrawn on request - held: s459E(1) of the *Corporations Act* relevantly provides that a creditor may serve on a company a statutory demand relating to a debt or debts owed by the company, which are "due and payable" - a debt

is due and payable once it is ascertainable, immediately payable and presently recoverable or enforceable by action - s459H(1) provides that the Court may set aside a statutory demand if satisfied that there is a genuine dispute as to the amount of the debt, or that the company has an offsetting claim - for a dispute to be genuine, it must be bona fide and truly exist in fact - a genuine offsetting claim means a claim on a cause of action advanced in good faith, for an amount claimed in good faith - s459J(1)(b) provides that the Court may set aside the statutory demand if satisfied there is "some other reason" why it should do so - aside from the general complaint that Tesoriero Investment Group has not obtained a judgment to support the debt, Haidi did not actually suggest it lacked the status of creditor and only had equitable rights in respect of the unpaid present entitlements - nor did Haidi argue that Tesoriero Investment Group's absolute entitlement to payment of the unpaid present entitlements was subject to some contingency or condition found in the trust deed for the Family Trust, or the underlying resolutions of Haidi as trustee - the genuine dispute contention failed - in the case of both alleged offsetting claims, there was an absence of mutuality in the identity or capacity of Tesoriero Investment Group as creditor who served the demand, and Haidi who asserted the alleged offsetting claim - Haidi had not identified any nexus between itself and Tesoriero Investment Group in respect of the asserted transactions - both offsetting claims lacked sufficient particularity to enable the Court to determine they were not fanciful - the offsetting claims contention failed - Haidi could not allege that there was "some other reason" to set aside the demand on the basis of abuse of process and a refusal to withdraw it, as these contentions were not identified expressly, or by reasonable inference, in the affidavits filed in support of Haidi's application within the 21 day statutory period to make such application - further, there was no evidence that Tesoriero Investment Group's liquidators sought to invoke the statutory demand procedure as a means of obtaining an advantage for which it was not designed or some collateral advantage beyond what the law offers - application to set aside statutory demand dismissed.

[Re Haidi Holdings Pty Ltd](#) (I B)

[From Benchmark Friday, 15 December 2023]

## **Thallon Mole Group Pty Ltd v Morton; Morton v Thallon Mole Group Pty Ltd [2023] QCA 250**

Court of Appeal of Queensland  
Bond & Boddice JJA, and Kelly J

Contracts - Morton and Thallon Mole Group Pty Ltd entered into a contract for Thallon Mole Group to construct a substantial residence for Morton at Holland Park - the contract price was in excess of \$4.5million - a dispute arose regarding the unavailability of two large "Schucco" sliding glass doors that were to be installed at the house, and the relationship between the parties disintegrated - Morton refused to pay Thallon Mole Group's progress claims, and said she was concerned about an incorrect reduction of the contract price arising from the sliding doors and other defective work - Thallon Mole Group gave notice of anticipated achievement of practical completion and issued its final progress claim - Morton terminated the contract and engaged other builders to complete the work and to rectify defects - Thallon Mole Group

commenced proceedings in the District Court, claiming about \$640,000 as monies owing for unpaid works carried out pursuant to the contract, about \$20,000 as a quantum meruit, and about \$17,000 for delay and disruption costs - Morton counter-claimed for about \$16,000 as liquidated damages and about \$540,000 as damages for the costs of completing the defective and incomplete works - the primary judge found that the majority of alleged defects were minor and did not prevent practical completion, but there were a number of defects or omissions that were not minor, which made the house unsuitable for occupation on 8 April 2019, and that therefore Thallon Mole Group had not achieved practical completion, and Morton's termination of the contract had been valid - both Thallon Mole Group and Morton applied for leave to appeal, which was required because of the small quantum involved - held: the primary judge had not erred by allowing the amount for the reinstallation of the timber flooring in the upstairs area of the house - once it was accepted that the flooring was not laid in accordance with the contractual requirements, Morton was entitled to have the upstairs flooring replaced and installed in accordance with the contractual requirements - the primary judge had not erred in exercising her discretion to award interest - the primary judge had not erred in dismissing the claim for a quantum meruit in respect of a variation for the cabinetry - the evidence as a whole supports a conclusion that it was open to the primary judge not to be satisfied that Morton had given approval to that variation - the primary judge did not err in reducing the "notional unpaid balance of the contract price" by only about \$140,000 on account of the Schucco doors and associated costs, rather than about \$190,000 as Morton contended - the primary judge's assessment of residual labour costs as 5% of the overall amount claimed was in accordance with the evidence and it could not be said the judgment formed by the primary judge produced a glaring improbable outcome, and so there was no basis for an appellate court to interfere with that finding - the primary judge did not err in dismissing Morton's claim for the costs of rectification of the pool balustrade, as reinstatement was not a reasonable course to adopt in the circumstances - other ground of appeal also failed - leave to appeal refused to both parties - parties to file written submissions on costs.

[Thallon Mole Group Pty Ltd](#) (I B C)

[From Benchmark Tuesday, 12 December 2023]

## **Le v Plummer [2023] WASCA 178**

Court of Appeal of Western Australia

Mitchell & Vaughan JJA

Malicious prosecution - the applicant sought to plead malicious prosecution against fourteen defendants who he alleged had each played an active role in the prosecution of various Commonwealth charges against him - the prosecutions were either discontinued or permanently stayed due to a significant failure by the prosecution to comply with disclosure obligations in respect of a very large volume of material - the applicant contended that the fact that such a substantial volume of material was not reviewed and disclosed meant that each respondent objectively did not have a proper to have formed the view that there was a proper case for prosecuting him - the primary judge struck out the statement of claim with leave to replead - the applicant filed a Minute which the primary judge treated as an application that the Minute stand

as his statement of claim, and dismissed with leave to make a further application - the applicant sought leave to appeal - held: a plaintiff who was the subject of a prosecution which terminated in his or her favour, and who brings a case in malicious prosecution must prove: (1) the defendant played an active role in the conduct of the prosecution; (2) the defendant acted without reasonable and probable cause, which can be established by proving either the defendant did not honestly conclude that the material on which he or she acted provided a proper case for prosecution, or that the material on which the defendant acted, considered in light of all of the facts of the particular case, was not objectively sufficient to support the conclusion that there was a proper case for prosecution; and (3) the defendant acted maliciously in instituting or maintaining the prosecution, in the sense that the defendant was actuated by a sole or dominant purpose other than the proper invocation of the criminal law - the primary judge was correct to conclude that the pleas that the respondents played an active role in the conduct of the prosecution and the pleas that the respondents acted without reasonable and probable cause were embarrassing - the applicant made allegations of serious professional misconduct in a complex matter, and, as a matter of fairness to the respondents, and in the interests of the efficient conduct of the trial, it was imperative that the pleadings alleging absence of reasonable and proper cause specifically identify in respect of each respondent: (1) the conduct which constituted playing an active role in the conduct of the prosecution; (2) the material considered by the respondent at the time of engaging in that conduct; and (3) what it was about that material which was objectively insufficient to support a conclusion that there was a proper case for prosecution - as to the first of these matters, what must be pleaded is not merely the position held by the particular respondent, but the conduct which amounted to that respondent instituting or maintaining the prosecution - the pleadings as to malice were also deficient - malice and absence of reasonable and probable cause are distinct elements of the cause of action and have separate roles to play - lack of an honest belief that the material considered provides a proper case for prosecution, or insufficiency of the material to support that conclusion, may support an inference of improper purpose, but the state of mind contended for must be separately pleaded - the correctness of the decision under appeal was not attended by sufficient doubt to justify leave to appeal - further, even if the primary judge's conclusion was wrong, there would be no substantial injustice in leaving the orders undisturbed, as additional inconvenience and expense by being required to reformulate pleadings with greater specificity would not constitute substantial injustice - leave to appeal refused.

[Le \(I\)](#)

[From Benchmark Monday, 11 December 2023]

## **Nova Builders Pty Ltd v Beno Excavations Pty Ltd (No 4) [2023] ACTSC 369**

Supreme Court of the Australian Capital Territory

Mossop J

Restitution - Harlech claimed to be owed about \$600,000 in unpaid invoices issued in accordance with an alleged agreement with Beno that Harlech would receive a share of Beno's gross profits on certain building projects - Beno denied the existence of the agreement and



contended that Harlech had been paid for all services provided - Harlech obtained an adjudicated determination under the *Building and Construction Industry (Security of Payment) Act 2009* (ACT) directing Beno to pay Harlech about \$600,000 - the determination was registered with the District Court, and Beno's bank account was garnished in an amount of about \$200,000 - the Supreme Court later quashed the adjudicator's determination for jurisdictional error - Beno sought a declaration that Harlech was liable to account to Beno for the amount garnished from its bank account and claimed restitution in that amount - the Court ordered that Harlech pay Beno the claimed amount "by way of restitution" - the Court later set the restitution order set aside, as Harlech had been entitled to receive the payment under the *Building and Construction Industry (Security of Payment) Act*, and because the fact that Harlech had commenced civil proceedings to resolve the factual dispute was a relevant change of circumstances (see Benchmark 23 October 2023) - the Court now determined the claim by Beno for a quantum meruit - held: where there was a contract in place governing the rights of the parties to that contract, quantum meruit is only available in limited circumstances - any claim for restitution must respect the allocation of risk provided for by a contract and, to that extent, is subsidiary to a contractual claim - where a contract is still in existence, a claim for restitution of a benefit conferred assessed on a quantum meruit is not available - upon termination for repudiation of an uncompleted contract containing an entire obligation for work and labour done, the innocent party may sue either for damages for breach of contract or, at the innocent party's option, for restitution in respect of the value of services rendered under the contract - if a contract contains divisible stages of work where at the completion of each stage a contractual right to payment is accrued, there is no right to restitution in relation to any completed stage, as the entitlement to recovery is governed by the contract - the contracts here had been discharged by agreement - where a contract is discharged by agreement, the consequences of that discharge will usually be dealt with in the agreement - however, where the discharge of the contract is inferred from conduct, the inferred agreement may not address the consequences of the discharge, and acceptance of a benefit by the defendant may provide a basis upon which a claim in quantum meruit may succeed - in this case, the contracts were not divided into stages, but there was entitlement to monthly payment if a claim was made during that month, dependent on an invoice being rendered - as no invoices had been rendered in the relevant periods, even though substantial work was done, there was no crystallised entitlement to part payment - the Court was not satisfied Nova had repudiated the contract, as its communications reflected an intention to honour its contractual obligations but an uncertainty as to how to do so - the availability of quantum meruit in circumstances where a partially completed contractual obligation is discharged by agreement but has conferred a benefit on the receiving party was consistent with High Court authority - the imposition of liability to make restitution in the current circumstances would not be such as to upset an allocation of risk reflected by the parties in their contracts - Beno was entitled to a quantum meruit.

[Nova Builders Pty Ltd](#) (I B C)

[From Benchmark Wednesday, 13 December 2023]



# Benchmark

## INTERNATIONAL LAW

### Executive Summary and (One Minute Read)

**Minnesota v Torgerson** (MINSC) - Odor of marijuana on its own without other facts did not constitute probable cause for warrantless search of vehicle

### Summaries With Link (Five Minute Read)

**Minnesota v Torgerson 995 N.W.2d 164 (2023)**

Supreme Court of Minnesota

Gildea CJ, Anderson, & McKeig JJ

A motor vehicle was stopped by the police because it had too many lights mounted on the grill. When the driver gave his license to the police, the officer stated that he smelled marijuana emanating from the vehicle. When questioned, the driver denied possessing marijuana. After conferring with a second officer, the police ordered the driver and passengers out of the vehicle and conducted a search. In the course of the search, the police discovered a canister of what was later found to be methamphetamine. At trial, the defendant sought to suppress the evidence obtained from the vehicle search on the grounds that there did not exist requisite probable cause for the search. The trial court suppressed the evidence and dismissed the matter. This was affirmed by the Minnesota Court of Appeals. The Minnesota Supreme Court stated that both the US and Minnesota Constitutions protect against unreasonable searches and seizures. Warrantless searches are *per se* unreasonable unless one of the exceptions to the warrant requirement applies. One of these exceptions is the automobile exception which permits the police to search a vehicle without a warrant if there is probable cause to believe the search will result in the discovery of evidence. The Court said that probable cause requires more than suspicion but less than the evidence necessary for conviction. A warrantless search must be based on objective facts and not the subjective good faith of the police. The Court noted that both industrial hemp and medical cannabis were lawful in Minnesota and the possession of a small quantity of marijuana was a petty misdemeanour and not a crime. The Supreme Court stated that, while the odour of marijuana can be a fact that supports probable cause, it is insufficient on its own because of the lawful right to possess medical cannabis under certain circumstances. As there was nothing else to support probable cause, the facts were insufficient to establish a fair probability that the search would yield evidence of criminal conduct. The suppression order was affirmed.

[Minnesota](#)



## Poem for Friday

### **In Memoriam, (Ring out, wild bells)**

**By:** Alfred, Lord Tennyson (1809-1892)

Ring out, wild bells, to the wild sky,  
The flying cloud, the frosty light:  
The year is dying in the night;  
Ring out, wild bells, and let him die.

Ring out the old, ring in the new,  
Ring, happy bells, across the snow:  
The year is going, let him go;  
Ring out the false, ring in the true.

Ring out the grief that saps the mind  
For those that here we see no more;  
Ring out the feud of rich and poor,  
Ring in redress to all mankind.

Ring out a slowly dying cause,  
And ancient forms of party strife;  
Ring in the nobler modes of life,  
With sweeter manners, purer laws.

Ring out the want, the care, the sin,  
The faithless coldness of the times;  
Ring out, ring out my mournful rhymes  
But ring the fuller minstrel in.

Ring out false pride in place and blood,  
The civic slander and the spite;  
Ring in the love of truth and right,  
Ring in the common love of good.

Ring out old shapes of foul disease;  
Ring out the narrowing lust of gold;  
Ring out the thousand wars of old,  
Ring in the thousand years of peace.

Ring in the valiant man and free,



The larger heart, the kindlier hand;  
Ring out the darkness of the land,  
Ring in the Christ that is to be.

Alfred, Lord Tennyson was born on 6 August 1809, in Somersby, Lincolnshire, England. *Ring Out, Wild Bells*, was part of *In Memoriam*, written to Arthur Henry Hallam, who died at 22. The poem was published in 1850, the year Tennyson was appointed Poet Laureate. The poem is inspired by the English custom to have the ring of bells, muffled to ring out the old year, and then, with muffles removed, to ring in the new year. *Ring Out, Wild Bells*, has been set to music including by Charles Gounod and Percy Fletcher. Alfred, Lord Tennyson died on 6 October 1892.

**Ring Out, Wild Bells**, Gounod, sung by the Mormon Tabernacle Choir  
[https://www.youtube.com/watch?v=TVEAt8v7b\\_g](https://www.youtube.com/watch?v=TVEAt8v7b_g)

**Ring Out, Wild Bells**, from *The Passing of the Year* by Jonathan Dove, Andrew Hon, conductor, sung by the Yale Glee Club  
<https://www.youtube.com/watch?v=yPlqqvOM8Og>

Bell Ringing in the Belfry at Great St. Mary's, Cambridge  
<https://www.youtube.com/watch?v=KNMFvNZIsCM>

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