

Friday, 28 June 2024

Weekly Civil Law Review

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

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Executive Summary (One Minute Read)

Gordon v The Vessel “Southern Star” (FCA) - Admiralty law - orders made permitting a Sydney Harbour party boat to trade while under arrest (I B)

Air Canada v Evans (NSWCA) - Air Canada's general tariff did not have the effect of waiving a cap on liability under the *Montreal Convention* (I B)

Lien v Huang (NSWSC) - interlocutory injunction against sale of land discharged on the basis of the balance of convenience - the principle that damages are not an adequate remedy for loss of land is not absolute, particularly where the rights of innocent third parties are involved (B C I)

The Owners - Strata Plan No 2661 v Selkirk (NSWSC) - Appeal Panel also erred in law in holding that a mitigation of damages defence could never be available in claims under s106(5) of the *Strata Schemes Management Act 2015* (NSW) (B C I)

Lazic v Rossi (NSWSC) - Magistrate failed to give adequate reasons for finding that a claimant who had hired a car after an accident had acted reasonably in mitigation of loss (I B)

In the matter of Openpay Group Ltd (recs and mgrs apptd) (subject to a DOCA) (NSWSC) - leave granted to administrators to transfer all shares to the proponent of a DOCA, as the evidence showed the shares had nil value, and there was thus no prejudice to shareholders (I B)

Botha v Secretary, NSW Department of Customer Service (NSWSC) - Appeal Panel of the NSW Personal Injury Commission had properly engaged with the ground of appeal raised by

the plaintiff (I B)

Jens v The Society of Jesus In Australia Limited (Evidence Ruling) (VSC) - Court made two rulings on the admissibility of hearsay evidence during a hearing to determine whether to set aside deeds of settlement regarding historical sexual abuse (I)

Princess Theatre Pty Ltd & Ors v Ansvar Insurance Limited (VSC) - theatre owner was entitled to indemnity for covid losses from its industrial special risks insurer (I B)

Hanson Construction Materials Pty Ltd v Decmil Australia Pty Ltd (VSC) - adjudicator under the *Building and Construction Industry Security of Payment Act 2002* (Vic) erred in taking an excluded amount into consideration (B C I)

Sumervale Pty Ltd v Viva Energy Refining Pty Ltd (VSCA) - land in industrial area still burdened by restrictive covenants designed to ensure residential amenity - removal of covenants sought to enable use as service station - nearby service station owners could not rely on loss of absence of competition as an injury justifying maintenance of the covenants (I B C)

Seddone v Commonwealth Bank of Australia (WASCA) - extension of time to appeal against consent orders refused, as there had been nothing arguably procedurally unfair in the making of the consent orders (I B)

McCagh v Rural Bank (WASCA) - borrowers failed in appeal against judgment given after a trial in which they had refused to participate (I B)

Alananzeh v Zgool Form Pty Ltd (ACTSC) - injured construction worker succeeded in negligence action against employer subcontractor and the head contractor (I B C)

HABEAS CANEM

First beach holiday



Summaries With Link (Five Minute Read)

Gordon v The Vessel "Southern Star" [2024] FCA 674

Federal Court of Australia

Stewart J

Admiralty law - the plaintiff commenced a proceeding *in rem* for maritime claims against a Sydney Harbour party boat (described by the Court as a well-known type of vessel more often heard than seen) and sought an arrest warrant - the plaintiff claimed sums amounting to less than \$10,000 - three other creditors lodged caveats against release, also for small amounts - the boat was arrested - the owner of the boat applied for urgent release, as the boat had a charter the evening of that day - the owner claimed it had a cross-claim for nearly \$30,000 against the plaintiff arising from damage caused to the boat - the owner also disputed two of the three caveators' claims, and said that it would immediately pay the third caveator's claim - the parties agreed to release from arrest on provision of a letter of undertaking, but this process would take more than a day - the Court therefore considered whether the vessel should be permitted to trade while under arrest - held: the power under r50 of the *Admiralty Rules 1988* (Cth) to make orders with respect to the preservation, management, or control of an arrested ship is broad - it was likely that long-term security would be agreed within a few days - the boat was required for previously arranged employment, and loss of that employment would cause losses to the owner, which might potentially be passed on to the plaintiff under s34 of the *Admiralty Act 1988* (Cth) as damages for the maintenance of an arrest unreasonably and without good cause - those losses might exceed the plaintiff's claim and arrest expenses - the plaintiff's claim was very small and would in a relatively short time be overtaken by the arrest costs, particularly if the Marshal, and through the Marshal, the plaintiff, had to pay for the berthing of the vessel whilst under arrest - orders made permitting the vessel to trade while under arrest.

[Gordon](#) (I B)

[From Benchmark Monday, 24 June 2024]

Air Canada v Evans [2024] NSWCA 153

Court of Appeal of New South Wales

Leeming & Payne JJA, & Griffiths AJA

Aviation law - a mother and daughter sued Air Canada for injuries allegedly suffered during turbulence - they sued in the Supreme Court under the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) and the applicable articles of the *Montreal Convention 1999* set out in Schedule 1A of the Act - Air Canada admitted that the Act and the Convention applied, but said the cap on personal injury damages in Article 21 of the *Montreal Convention* applied - the primary judge answered "yes" to the question whether, if the Court assessed damages greater than the cap, each plaintiff would be entitled to recover that amount from Air Canada under Air Canada's *International Tariff General Rules*, even if Air Canada could prove that the damages were not due to negligence or other wrongful act or omission (see Benchmark 13 December 2013) - Air Canada sought leave to appeal against this answer - held: under the regime established by the

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Warsaw Convention, liability for personal injury is subject to limits, which have been waived by most carriers (including Air Canada, as reflected in Air Canada's tariff) - the tariff had to accommodate the reality that it would apply to some passengers governed by the *Warsaw* regime and others governed by the *Montreal Convention*, and it also had to comply with a range of international regulatory requirements - textual considerations suggested that the relevant tariff clause did not have the effect of waiving the partial defence created by the *Montreal Convention* - this was confirmed by the absence of any reference to the waiver provisions in the *Montreal Convention* - the purpose of the provision incorporating the rules of the *Montreal Convention* in the tariff was to ensure that the waiver of Air Canada's entitlements under the *Warsaw* regime remained, in particular the waiver of the cap on liability for death or personal injury, while ensuring the *Montreal Convention* applied, which of itself exposed a carrier to uncapped liability for death or personal injury - the purpose of the rule providing for no cap where the *Montreal Convention* applied was quite different, and was to comply with notification requirements under regulatory regimes including that imposed by the Canadian government - leave to appeal granted, appeal allowed, and question answered "no".

[View Decision](#) (I B)

[From Benchmark Tuesday, 25 June 2024]

Lien v Huang [2024] NSWSC 761

Supreme Court of New South Wales

Hmelnitsky J

Equity - the plaintiff owned real property at Chatswood the plaintiff's son lived in the property with his wife, until their divorce in 2018 - the wife asked for half of the property, but the son said it belonged to the plaintiff and was not his to give - the plaintiff and his son both moved back to Taiwan - the son returned to Australia in 2024 and discovered that the property had been transferred into the name of his ex-wife (a licenced conveyancer) for consideration of \$1, and the ex-wife had entered into a contract to sell it for \$4.5million with completion pending - the ex-wife had had early access to the deposit and had used it as a deposit for the purchase of another property at Artarmon, where completion was also pending - the father obtained an urgent interlocutory restraint against the completion of the sale of the Chatswood property and a freezing order against the assets of the ex-wife - the ex-wife claimed that the plaintiff had consented to the transfer - the ex-wife now sought that the injunction be discharged to allow both sales to complete, with the freezing order continued to apply to the net proceeds of sale of the Chatswood property - held: the plaintiff had demonstrated a relatively strong prima facie case but it was not possible to reach a firm conclusion as to whether he would ultimately succeed - if the injunction were continued, the purchaser of the Chatswood property would be deprived of its right to complete the purchase of that property - further, the vendor of the Artarmon property would lose the benefit of her contract, and the deposit for the Artarmon property would likely be forfeited, making the return of the deposit for the Chatswood property extremely difficult if not impossible for the ex-wife, at least in the short term - on the other hand, if the injunction were discharged, the plaintiff would lose any prospect of recovering title to the Chatswood property - the plaintiff said the Chatswood property had sentimental value to him

Benchmark

and that he may wish to return to it someday, and that he did not consider damages an adequate remedy - there is a long line of authority that real property is unique and damages are not an adequate remedy - this proposition is not absolute - in all cases where an injunction is sought, the Court must determine what is "just and convenient", having regard to s66(4) of the *Supreme Court Act 1970* (NSW) - the Court must take account of the position third parties - the purpose of an interlocutory injunction is to preserve the status quo pending trial, but exactly what this means will vary from case to case - here, where the interests of third parties were involved and where the father's economic position could be sufficiently protected by the continuation of the freezing order, the balance of convenience favoured discharge of the injunction - injunction discharged and freezing order continued - costs as between the plaintiff and ex-wife reserved, and the plaintiff and ex-wife to pay the Chatswood purchaser's costs with any such costs actually paid to be that party's costs in the cause.

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

[From Benchmark Monday, 24 June 2024]

The Owners - Strata Plan No 2661 v Selkirk [2024] NSWSC 760

Supreme Court of New South Wales

Leeming JA

Strata title - Selkirk engaged in litigation against her strata corporation - Selkirk's claimed for rectification and lost rent following a leak from her flat's bathroom, and the owners corporation's conceded breach of the duty imposed on it by s106(1) of the *Strata Schemes Management Act 2015* (NSW) to repair and maintain the common property - the owners corporation sought leave to appeal on questions of law from a decision of the Appeal Panel of the NSW Civil and Administrative Tribunal that had found in Selkirk's favour - held: the Appeal Panel erred in disregarding the entirety of the earlier findings adverse to Selkirk by reason of the power of the owners corporation under s122 to obtain orders to access her lot - the Appeal Panel also erred in law in holding that a mitigation of damages defence could never be available in claims under s106(5) - it was open to the owners corporation to establish that Selkirk's own unreasonable conduct meant that parts of the lost rent she claimed were not to be regarded as losses "as a result of" the owners corporation's breach of s106(1) - the Appeal Panel's error of law warranted a grant of leave because it was dispositive of the appeal, and was of general importance - the Court expressed a number of conclusions to assist the Tribunal on remittal, including: (1) the duties imposed on an owners corporation by s106(1) and (2) are not discharged by the exercise of reasonable care, nor by establishing that a lot owner has contributed to the defective condition of the property; (2) the duties imposed on an owners corporation by s106(1) and (2) are not invariably applicable; they may be rendered inapplicable pursuant to s106(3) or (7), and compliance may be deferred pursuant to s106(4); in all save exceptional cases, a breach of the duties in s106(1) or (2) will make it appropriate for an order rectifying those breaches pursuant to s232 to be made, including to the extent necessary an order authorising investigative works; (4) the existence of a breach of duty is an element of the statutory right to damages conferred by s106(5), but is not a sufficient condition, and it remains necessary for a lot owner to demonstrate that the claimed damages answer the description of

Benchmark

"reasonably foreseeable loss suffered by the owner as a "result of" that breach; (5) it is open to an owners corporation to contend in response to a claim for damages pursuant to s106(5) that the claimed loss is not reasonably foreseeable, or is not "as a result of" the breach.; (6) whether or not a claimed loss is "as a result of" the breach is to be determined in a practical way; and (7) in determining whether a claimed loss is or is not "as a result of" the breach, it is open to an owners corporation to contend that the sole cause of the loss is conduct by the lot owner, or something other than the owners corporation's breach (such as an intervening act), or that the lot owner's own unreasonable conduct is the cause of the claimed loss, and it is better to attend to the statutory language in this regard, rather than asking whether there has been a "break in the chain of causation", or whether the "true cause" of the loss is the lot owner's own conduct, or whether the lot owner has unreasonably failed to mitigate the lot owner's loss - leave to appeal granted in part and appeal allowed.

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

[From Benchmark Tuesday, 25 June 2024]

Lazicic v Rossi [2024] NSWSC 777

Supreme Court of New South Wales

Kirk J

Torts - Lazicic crashed into a relatively new Honda Civic owned and driven by Rossi - Lazicic's insurer accepted Lazicic was at fault and liable in negligence to Rossi for the value of the Honda, which was written off - Rossi rented a Hyundai i30 for 86 days, until his insurer provided him with a replacement Honda Civic - there was no dispute that it was reasonable for Rossi to hire an i30 for 86 days - the care hire company charged nearly \$30,000 for the hire, which was greater than the purchase price of the i30 - the insurer refused to pay this amount - Rossi commenced proceedings in the Local Court, and the Magistrate upheld the claim for the rental cost - Lazicic appealed to the Supreme Court on questions of law - held: despite allowances that had to be made in the case of Local Court Magistrates with crushing caseloads and few resources, there remains a duty to provide reasons which consider and address the core matters of law or fact in dispute between the parties - the reasons should be sufficient for it to be apparent to the parties that those core matters have been grappled with, in a reasoned way, and such that they can consider the merits of any appeal - the Magistrate failed to provide adequate reasons for finding that Rossi acted reasonably in mitigating his loss - to speak of a cost being outside the reasonable "range" is at best the language of conclusion - rather, the test as whether or not Rossi acted reasonably in acting as he did such as to incur the rental cost for which he was claiming reimbursement - a claimant will not win simply by pointing to a range of market prices and saying the rate chosen was not the most expensive one - neither excessive diligence nor perfection is required of a claimant - the Magistrate failed to address the evidence and Lazicic's submissions in relation to mitigation of loss, which was the only live issue in the case - appeal allowed, and matter remitted to the Local Court for determination according to law.

[View Decision](#) (I B)

[From Benchmark Thursday, 27 June 2024]

In the matter of Openpay Group Ltd (recs and mgrs apptd) (subject to a DOCA) [2024]

NSWSC 789

Supreme Court of New South Wales

Black J

Corporations law - Openpay was listed on the ASX and was the parent company of several companies which primarily operated a "buy now pay later" service - the group aimed to extend its business to operate a platform which allowed consumers to complete transactions up to a limit of \$20,000 with repayment terms of up to 24 months over a range of industries including automotive, healthcare, home improvement, education and retail - in due course, it entered into a trading halt and receivers and managers, and then voluntary administrators, were appointed - the voluntary administrators sought leave under s444GA of the *Corporations Act 2001* (Cth) to transfer all the shares in Openpay to the proponent of a Deed of Company Arrangement Openpay had entered into; held: the possibility of prejudice to a shareholder would arise if there was some residual equity in the company - it was difficult to see how shareholders could be prejudiced by the transfer of their shares in the absence of any residual value or equity in the company - the case law established that there would not ordinarily be any prejudice, or no prejudice that has the requisite quality of "unfairness", if the shares had no value and there would be no distribution in the event of a liquidation, which was the only realistic alternative to the proposed transfer - the Administrators bore the legal onus of proving that the Court's discretion to allow the share transfer should be exercised in their favour - an independent expert had valued the shares on an orderly realisation of assets basis, and the Court accepted that other methodologies such as a cash flow basis, a multiple of earnings method, or a quoted price for listed securities basis, were not available or were not appropriate - the Court accepted that the shares had nil value - the recoveries identified by the Administrators in a liquidation scenario would be insufficient to repay creditors in full - there was no prejudice to shareholders in the orders sought by the Administrators being made, let alone unfair prejudice - orders made as sought.

[View Decision](#) (I B)

[From Benchmark Friday, 28 June 2024]

Botha v Secretary, NSW Department of Customer Service [2024] NSWSC 781

Supreme Court of New South Wales

Stern JA

Workers compensation - the plaintiff sustained psychiatric injury by reason of interpersonal conflicts with her direct supervisor in her role as a Senior Executive (Director of Client Stakeholder Services) employed by the Department of Customer Service - she sought compensation and a dispute arose as to the extent of her impairment - a Medical Assessor certified that she had a 9% permanent impairment - as this was less than 15%, s65A and s151H of the *Workers Compensation Act 1987* (NSW) provided that no compensation for non-economic loss under Div 4 of Pt 3 of that Act or claim for work injury damages was available - an Appeal Panel of the NSW Personal Injury Commission affirmed the Medical Assessor's

Benchmark

certificate - the plaintiff sought judicial review of the Appeal Panel's decision - held: subject to materiality, failure by an Appeal Panel to perform its statutory task of conducting a review on the ground, or grounds, of appeal advanced, or a misunderstanding of the case brought by an applicant, may amount to jurisdictional error - it was apparent from the Appeal Panel's decision that the Appeal Panel was aware of, considered, and rejected the plaintiff's sole ground of appeal - in two places, the Appeal Panel correctly identified the plaintiff's contention as to demonstrable error, including that the Medical Assessor's conclusion was illogical and unsupported having regard to the findings in the body of the Certificate - the Appeal Panel engaged with the issue raised by the plaintiff's ground of appeal, which was whether the matters found by the Medical Assessor supported his conclusion as to categorisation on the Social and Recreational Psychiatric Impairment Rating Scale - while the Appeal Panel did not expressly engage with the plaintiff's contention that the Medical Assessor's conclusion should be construed as relying only upon social activities which involved the plaintiff leaving her home, it was implicit in the Appeal Panel's reasoning that they rejected that contention - it was also clear that the Appeal Panel was satisfied that the findings of the Medical Assessor in the body of the Certificate properly supported the Medical Assessor's conclusion that the plaintiff's attendance at social and recreational activities was "regular" - application for judicial review dismissed.

[View Decision](#) (I B)

[From Benchmark Friday, 28 June 2024]

Jens v The Society of Jesus In Australia Limited (Evidence Ruling) [2024] VSC 330

Supreme Court of Victoria

Ierodionou AsJ

Hearsay evidence - the plaintiff was sexually abused by a Jesuit priest while student boarder at Xavier College in Melbourne in 1968 and 1970 - the plaintiff had signed settlement deeds in 2011 - the Court set aside these settlement deeds (see Benchmark 21 June 2024) - the Court now published its reasons for two evidentiary rulings during the hearing as to whether to set aside the deeds - held: a letter from the plaintiff's former solicitors to the plaintiff was admissible pursuant to s75 of the *Evidence Act 2008* (Vic) (which provides that, in an interlocutory proceeding, the hearsay rule does not apply to evidence if the party who adduces it also adduces evidence of its source) - the reference in an affidavit to the advice being "important" was an opinion and not admissible, and the following extract from the letter in the affidavit should also be excluded as the sentence introducing it was inadmissible - the reference to the plaintiff being provided with the letter was inadmissible, as the deponent did not know whether this was so, and his statement that it was so provided was hearsay - the Court did not presume that the plaintiff received the letter - the letter was hearsay evidence, as there was no evidence from the author of the letter - the business records exception in s69 of the *Evidence Act* did not apply, due to the exception in s69(30) for a representation prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, legal proceedings - however, s75 was satisfied, as the pre-trial application to set the deeds aside was an interlocutory proceeding, and there was evidence the source of the letter was the former solicitors, who produced it pursuant to a subpoena - the letter should not be excluded under s135, as it had

probative value, and its admission would not unfairly prejudice the plaintiff - a paragraph in the affidavit of the Jesuit Provincial who finished in that position in 2008, based on his discussions with his successors, he understood that changes he had introduced to make the Province a model litigant (who would not rely on technical defences regarding the identity of the defendant or limitation periods) continued was inadmissible as hearsay - s75 did not save this paragraph, as "based on my discussions with my successors" was too vague to constitute an identification of source for the purposes of s75 - the identification of the source must be such as to go some way to assist the Court in assessing the reliability of that evidence.

[Jens \(I\)](#)

[From Benchmark Monday, 24 June 2024]

Princess Theatre Pty Ltd & Ors v Ansvar Insurance Limited [2024] VSC 363

Supreme Court of Victoria

M Osborne J

Insurance - the owner of several theatres in Melbourne claimed under an extension to its industrial special risks insurance policies for two periods of insurance for about \$20million of losses sustained as a result of the covid lockdowns in 2020 and 2021, which occurred pursuant to a series of directions issued by the Victorian government and associated advice - the Insurer denied the extension was engaged, and said that, if it were, it should be rectified such that indemnity was excluded on the basis that the parties had a common intention, known to each other, that a proviso the extension should be rewritten such that 'declared to be quarantinable diseases under the *Quarantine Act 1908*' was replaced with 'listed as a human disease pursuant to the *Biosecurity Act 2015 (Cth)*' - held: insurance policies are to be given a business-like interpretation in accordance with the principles for general commercial contracts - construction of a policy will be approached on the basis that the parties intended to produce a commercial result and constructions that make for commercial nonsense or would work commercial inconvenience should be avoided - the *contra proferentem* rule applies to ambiguities but is generally is a doctrine of last resort and has perhaps limited vitality - on its proper construction, the insured was entitled to cover under the extension unless the proviso applied - to obtain rectification, the insurer had to demonstrate that, at the time of entry into the policies, the parties had a common intention and that the written instruments did not conform to that common intention - the fact that both insured and insurer may have believed that the wording of the proviso excluded cover did not entitle the insurer to rectification, unless it could point to a common intention that cover would be excluded even if the proviso did not have that effect - no one turned their mind to that circumstance - rectification refused - a \$500,000 sublimit applied in each period of insurance with respect to each of the four venues, so the maximum amount of the insurer's liability in each period of insurance was \$2million, such that the maximum liability of the insurer was \$4 million - the Court calculated an indemnifiable loss of about \$800,000 for the first period and \$2million for the second period.

[Princess Theatre Pty Ltd & Ors \(I B\)](#)

[From Benchmark Thursday, 27 June 2024]

Benchmark

Hanson Construction Materials Pty Ltd v Decmil Australia Pty Ltd [2024] VSC 361

Supreme Court of Victoria

Stynes J

Administrative law - Decmil subcontracted Hanson to supply and deliver concrete and associated mixing, testing and pouring services for the construction of 52 wind turbines - Hanson served a payment claim under the *Building and Construction Industry Security of Payment Act 2002* (Vic) in relation to a foundation - Decmil responded with a payment schedule stating a nil amount to be paid, on the basis that the foundation was defective and that Decmil was entitled to set off the costs of rectification, which were greater than the amount of the payment claim - an adjudicator under the Act found that the foundation was defective, Decmil was entitled to a set off, but in an amount less than the payment claim, leaving an amount of about \$700,000 payable to Hanson under the payment claim - Hanson sought judicial review of the adjudicator's decision - held: the rectification costs claimed by Decmil were an excluded amount for the purpose of s10B of the Act - an "excluded amount" relevant includes "any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract" - s23 provides that, in determining an adjudication application, the adjudicator must not take into account any part of the claimed amount that is an excluded amount - there is an important difference between the NSW and Victorian Acts, in that the Victorian Act includes s23(2B), which relevantly provides that if an adjudicator's determination takes into account an excluded amount, it is void to that extent - the Victorian Supreme Courts is also more willing than the NSW Supreme Court to order remittal of a matter to an arbitrator where jurisdictional error is established - adjudication decision quashed in so far as the adjudicator took into account the costs of rectification, and adjudication application remitted to the adjudicator to determining the adjudicated amount in accordance with law.

[Hanson Construction Materials Pty Ltd](#) (B C I)

[From Benchmark Thursday, 27 June 2024]

Sumervale Pty Ltd v Viva Energy Refining Pty Ltd [2024] VSCA 140

Court of Appeal of Victoria

Niall JA, Richards, & J Forrest AJJA

Restrictive covenants - the respondent intended to construct a service station on land that it owned, which would dispense hydrogen, gasoline, and diesel, and which would offers fast charging stations for battery electric vehicles - it could not do so because of four restrictive covenants requiring that there only be a single dwelling on the land, and that there could be no building erected on the land, other than a dwelling house, school, church or hall and outbuildings thereto, and there could be no trade or business carried out on the land - the respondent applied under s84(1)(c) of the *Property Law Act 1958* (Vic) for the discharge of the restrictive covenants - two owners of nearby land having the benefit of the covenants objected - these owners were both petroleum companies who wished to avoid the respondent setting up a competing service station - the primary judge ordered the covenants discharged (see Benchmark 12 July 2023) - the owners sought leave to appeal - held: s84(1)(c) directs attention

Benchmark

to whether the proposed modification or removal will 'substantially injure' the persons entitled to the benefit of the restriction - s84(1)(c) hinges on the existence of a substantial injury and not merely the loss of the benefit of the restriction - the textual distinction between injury and the loss of the benefit of the restriction also directs attention to the practical consequences that the removal or modification of the restriction might produce - the logic of s84(1)(c) requires some connection, justifying the retention of the restriction, between the covenant and the injury - a mere consequential or causal connection is not enough - to construe the concept of injury as tantamount to the loss of any benefit still being enjoyed would compel the refusal of an application unless the restriction were obsolete, and then, since s84(1)(a) applies in cases of obsolescence, this would leave s84(1)(c) with very little, if any, work to do - therefore, the purpose of the covenant constrains the kind of injury that might be occasioned by the modification or removal of the restriction - leave to appeal granted but appeal dismissed.

[Sumervale Pty Ltd](#) (I B C)

[From Benchmark Thursday, 27 June 2024]

Seddone v Commonwealth Bank of Australia [2024] WASCA 70

Court of Appeal of Western Australia

Mitchell J

Consent orders - a bank commenced proceedings against Seddone and Prohaska for default on a loan - orders were made as proposed by the bank with Seddone's consent - about five years later, Seddone sought to appeal against the orders - held: Seddone's complaint of a failure to accord procedural fairness was to be assessed in the context where she consented to the order granting judgment in favour of the bank - Seddone did not seek to place any evidence or submissions before the court in opposition to the bank's summary judgment application - when the matter came on for hearing before a master, the bank's counsel explained its proposal, Seddone was given four weeks to consider the proposal and obtain legal advice in relation to it, and then, when the matter came on for hearing again before an acting master, Seddone indicated that she consented to the orders proposed by the bank - the acting master had no obligation to interrogate Seddone about her understanding of the agreement or the state of her mental health - there is no evidence that Seddone misunderstood what was proposed by the bank or was incapable of understanding and participating in the hearing - if the orders were not going to be made by consent, the acting master indicated that Seddone would have a short further opportunity to file material in opposition - there was nothing arguably procedurally unfair about the primary court's approach - the bank's proposal was not commercially unreasonable - applications for extension of time to appeal, and for leave to appeal, refused.

[Seddone](#) (I B)

[From Benchmark Tuesday, 25 June 2024]

McCagh v Rural Bank [2024] WASCA 68

Court of Appeal of Western Australia

Mitchell, Vaughan, & Vandongen JJA

Banking - a bank sued borrowers to recover money claimed to be owing under five finance

Benchmark

facilities - the borrowers did not defend the trial, and the primary judge gave judgment for the bank for about \$10million and ordered the borrowers to give possession of mortgaged agricultural land to the bank - two of the borrowers appealed - held: the appellants had made a deliberate choice not to defend the trial - after correspondence with the Court regarding available dates, the appellants had informed the Court that they were withdrawing from any participation in the trial - O34r2 of the *Rules of the Supreme Court 1971* (WA) provides that, when a trial is called on, if a party does not appear the judge may proceed with the trial in the absence of that party - O34r2 provides a mechanism for the absent party to apply to set aside any judgment given, but the appellants had not proceeded in that way, and sought to appeal against the judgment - in the absence of the borrowers at trial it remained necessary for the bank to prove its claim so far as the legal onus of proof rested on the bank - however, an appellant who does not appear at trial cannot assert error by the primary judge merely because the appellant's absence at trial made it easier for the other party to adduce evidence and prove its case - further, such an appellant cannot allege that the primary judge was in error for failing to consider arguments that the appellant now seeks to run on appeal - the borrowers' election not to participate in the trial had the result that there was no evidence whereby it was incumbent on the primary judge to consider and determine all of the issues raised in the borrowers' defence and counterclaim - appeal dismissed.

[McCagh](#) (I B)

[From Benchmark Thursday, 27 June 2024]

Alanazeh v Zgool Form Pty Ltd [2024] ACTSC 16

Supreme Court of the Australian Capital Territory

McWilliam J

Negligence - the plaintiff was employed as a labourer by a subcontractor at a construction site when he slipped and fell, injuring his back - he brought proceedings in negligence against the subcontractor employer and the head contractor - the subcontractor had failed to hold the required workers compensation insurance and so the Workers Compensation Default Insurance Fund Manager under Div 8.2.2 of the *Workers Compensation Act 1951* (ACT) was the third defendant - held: the Court accepted the plaintiff's evidence of what had occurred - the subcontractor, as employer, owed a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury - the employer must take into account the possibility of thoughtlessness, or inadvertence, or carelessness, particularly in a case of repetitive work - the head contractor also had a duty to exercise reasonable care with regard to the safety of the area in which it was directing work to be undertaken, but this duty was not non-delegable, and did not extend to telling the plaintiff how to carry building materials, or how to lay them, or to providing mechanical assistance to undertake the work, as those were matters that it was reasonable for the head contractor to expect the subcontractor employer to manage and supervise - both the head contractor and subcontractor employer had failed to discharge their duties of care - as to causation, the plaintiff did not have to prove that the negligence was the sole causal mechanism, only that it was a necessary condition, pursuant to s45(1)(b) of the *Civil Law (Wrongs) Act 2002* (ACT) - the plaintiff had established that causation

Benchmark

here - the evidence did not establish contributory negligence - the plaintiff had had an underlying susceptibility or degenerative condition but that it was asymptomatic, and the fall caused the condition to become symptomatic (whether by exacerbation or acceleration of a degenerative condition), with the result that the current pain symptoms and restriction of mobility were, on the balance of probabilities, causally related to the accident - total damages of about \$245,000 assessed - as the plaintiff had established liability against each of the defendants, the plaintiff was entitled to enforce the totality of the judgment against the head contractor, and so, under s170 of the *Workers Compensation Act*, the plaintiff could not claim as against the default insurer - if the subcontractor employer had had funds to meet the claim, the Court would have found the defendants were equally negligent, resulting in apportionment of 50% each.

[Alanazeh](#) (I B C)

[From Benchmark Friday, 28 June 2024]

Benchmark

INTERNATIONAL LAW

Executive Summary and (One Minute Read)

United States v Rahimi (SCOTUS) - Federal statute that prohibits individuals who are subject to a domestic violence restraining order from firearm possession does not violate the Second Amendment right to keep and bear arms

Summaries With Link (Five Minute Read)

United States v Rahimi 602 US __ (2024)

United States Supreme Court

In an 8-1 decision (Thomas, J dissenting), the Supreme Court upheld the validity of what are known as 'red flag' laws that prohibit firearm possession by domestic abusers. During a dispute with his girlfriend, Rahimi fired a gun that he kept in his car. She obtained a restraining order from a court in Texas. The Texas Court further suspended Rahimi's gun license for two years on the grounds that the violence was likely to occur again. During this period, Rahimi threatened additional women with a gun and was a suspect in an additional five shootings. When police searched his home, they found firearms, ammunition, and a copy of the restraining order. Rahimi was indicted for violating a federal statute that prohibits firearm possession while subject to a domestic violence restraining order. Rahimi claimed that the statute was unconstitutional because it established a restriction on the right to keep and bear arms that was not part of firearm regulation at the time the Second Amendment was adopted in the 18th Century. The District Court rejected this argument, but the US Court of Appeals agreed that the statute was unconstitutional. In the opinion by Roberts CJ, the Court pulled back from a purely historical approach to gun rights. The Chief Justice stated that recent court decisions expanding firearm rights 'were not meant to suggest a law trapped in amber'. By this the Court moved away from the history and tradition test and recognised that the Second Amendment permits regulations that may not have existed in 1791. The Court held that, while the right to keep and bear arms was a fundamental right, prohibitions on going armed were accepted as part of the common law at the time the Second Amendment was adopted. The Court said that the statute only prohibited possession while the restraining order was in effect and where a court had found that the individual represented a credible threat to the physical safety of others in a domestic situation.

[United States v Rahimi](#)

Poem for Friday

Adlestrop

By Edward Thomas (1878-1917)

Yes. I remember Adlestrop
The name, because one afternoon
Of heat the express-train drew up there
Unwontedly. It was late June.

The steam hissed. Someone cleared his throat.
No one left and no one came
On the bare platform. What I saw
Was Adlestrop only the name

And willows, willow-herb, and grass,
And meadowsweet, and haycocks dry,
No whit less still and lonely fair
Than the high cloudlets in the sky.

And for that minute a blackbird sang
Close by, and round him, mistier,
Farther and farther, all the birds
Of Oxfordshire and Gloucestershire.

Edward Thomas, an English poet biographer, author, essayist, and critic was born on 3 March 1878, the son of Welsh parents, a railway clerk, politician and preacher Phillip Thomas, and Mary Townsend. His connection to Wales was important throughout his life. He was described by Aldous Huxley as "*one of England's most important poets*". Thomas wrote poetry from 1914, when he was 36, encouraged by his new neighbour, the then relatively unknown Robert Frost. During his life, his only published poetry was *Six Poems* (1916) under the pseudonym Edward Eastaway. Thomas struggled with the burden of constant production of what some critics described as "hack work" to support his family, and the work he wished to produce. At times he was reviewing up to 15 books each week. He made many attempts at suicide, suffering marital disharmony and depression. Adlestrop is considered one of Thomas' finest poems. The poem describes the ordinary circumstances of Thomas' train from Paddington to Malvern, stopping at Adlestrop station at 12:15pm with images of the surrounding English countryside. However the poem elicits profound feelings in the reader through those descriptions. Thomas was killed in the Battle of Arras, in France on 9 April 1917, having enlisted for service in the British infantry in 1915. Ted Hughes described Thomas as "*the father of us*"

all’.

Adestrop by Edward Thomas, composed by Susanna Self- the third of six “Songs of Immortality”

<https://www.youtube.com/watch?v=2NYUdo12yfg>

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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