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Benchmark

Friday, 3 May 2024

Weekly Construction Law Review

Selected from our Daily Bulletins covering Construction

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Executive Summary (One Minute Read)

Box Hill OHP v Whitehorse CC (VSC) - Victorian Civil and Administrative Tribunal had not erred in affirming a refusal by Council to grant a permit for a service station

Nasseri v Wellington Builders Pty Ltd & Ors (VSC) - corporate trustee of unit trust controlled by the owner of land was, on a building contract's proper construction, a party to that contract, and was therefore liable under the *Building and Construction Industry Security of Payment Act 2002* (Vic)

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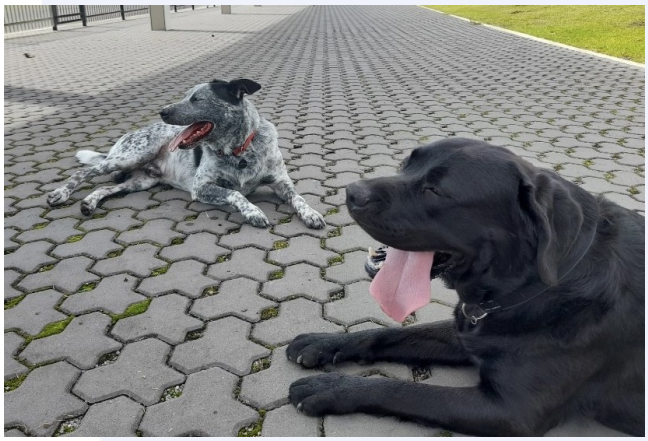
HABEAS CANEM

Panting pooches



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Summaries With Link (Five Minute Read)

Box Hill OHP v Whitehorse CC [2024] VSC 199
Supreme Court of Victoria
Watson J
Planning law - OHP applied to Whitehorse City Council for a permit for a proposed service station - Council refused the application - OHP filed an application for review of the Council's decision with the Victorian Civil and Administrative Tribunal, which affirmed Council's decision to reject OHP's application and determined that no permit should be issued for the proposed service station - OHP sought leave to appeal from the Tribunal's decision - held: the prospects of the appeal were real and not fanciful, so the Court would grant leave to appeal - under the *Whitehorse Planning Scheme*, the land as in a residential growth zone and also in a substantial change area - in determining whether the Tribunal had made an error of law, the weight to be given to the various considerations which may be relevant on the one hand, and to particular facts bearing on those considerations on the other hand, is not fixed by the planning scheme but is essentially a matter for the decision maker - for a residential growth zone and a substantial change area the planning policy provides relatively more encouragement for housing use and less encouragement for a service station - when regard was had to the totality of the Tribunal's reasons, the better characterisation of the Tribunal's decision was that it permissibly gave weight to the policy objectives of the *Whitehorse Planning Scheme* and its prioritisation and encouragement for increased density of housing use in the area in which the land is situated as part of an overall weighing of the various factors which were relevant on the application for the permit - the Tribunal's finding was not legally unreasonable having regard to the Tribunal's other findings regarding the proposed service station use - the Tribunal had not impermissibly treated the service station proposal's consistency with 'the planning policy and strategic vision' as a threshold issue prior to and without regard to its amenity impacts - the Tribunal had not failed to consider whether a service station was an 'acceptable' outcome under the planning scheme, and had not impermissibly considered the application by reference to an ideal or optimal use, being higher density housing - the Tribunal had not fallen into any error of law - leave to appeal granted but appeal dismissed.
Box Hill OHP
[From Benchmark Thursday, 2 May 2024]

Nasseri v Wellington Builders Pty Ltd & Ors [2024] VSC 200
Supreme Court of Victoria
Garde J
Building and construction contracts - the plaintiff signed a MOU and then a development management agreement with a property developer - the parties in due course fell into dispute - the builder made a payment claim under the *Building and Construction Industry Security of Payment Act 2002* (Vic) in the amount of about $150,000 for completing the base stage of the project - the plaintiff did not provide a payment schedule - an adjudicator found that the works were at base stage when the payment claim was made, and determined that about $160,000

was payable to the builder with an applicable rate of interest of 10% per annum - the plaintiff sought judicial review of the adjudicator's determination - held: identification of the parties to a contract must be in accordance with the objective theory of contract - when consideration was given to the text of the contract, the surrounding circumstances known to the parties, and the purpose and object of the parties, it was plain that the parties intended that the corporate trustee of a unit trust associated with the plaintiff to be a party to the contract - the handwritten changes to the contract and appendix to the contract made it clear that the parties intended that the unit trust have an important role under the contract and be subject to the rights and liabilities set out in its provisions - the plaintiff signed the contract because she was the landowner and this was entirely consistent with the parties' intention that the corporate trustee be a party to the contract - the post-contractual conduct of the parties overwhelmingly and compellingly pointed to the same conclusion - the contract was not void *ab initio* under s31(2) of the *Domestic Building Contracts Act 1995* (Vic) for want of signature by the building owner or authorised agent, as the plaintiff should be taken to have signed both in her own right as owner, and as authorised agent of the corporate trustee - the adjudicator had plainly correct when he treated the plaintiff and the corporate trustee as the respondents to the adjudication application - the adjudicator also had not erred in concluding that the plaintiff was 'in the business of building residences' within the meaning of s7(2)(b) of the *Building and Construction Industry Security of Payment Act* - where jurisdiction depends on a matter of fact, the Court determines the question of fact for itself on the evidence placed before it, the burden of establishing the facts which show an absence of jurisdiction always rests of the party applying for relief, and the standard of proof is high, requiring clear proof leading unmistakably to the conclusion that there was an excess of jurisdiction - the plaintiff and the builder were a commercial syndicate working together to achieve a profit-making objective, and both were in the business of building residences - the plaintiff's profit making intention could be ascribed also to the corporate trustee of the unit trust which was under her control - proceedings dismissed.

Nasseri

[From Benchmark Friday, 3 May 2024]

Executive Summary and (One Minute Read)

R v Secretary of State for the Home Department (UKSC) - Failed asylum seeker who committed criminal acts within the UK and who thwarted his deportation was lawfully refused government benefits and was not denied his rights under the *European Convention on Human Rights*

Summaries With Link (Five Minute Read)

R v Secretary of State for the Home Department [2024] UKSC 13
Supreme Court of the United Kingdom
Lord Lloyd-Jones, Lord Sales, Lord Hamblen, Lord Stephens, and Lady Simler
AM was a national of Belarus. He arrived in the UK in 1998 and claimed asylum. In 2000, he was denied asylum status and removed to Belarus. He was denied entry to Belarus and returned to the UK because he provided Belarus officials with false information that caused the officials to believe that he was not a citizen. Upon his return to the UK, he committed various criminal offences and was classified as a foreign criminal by British authorities. The Government desired to extradite AM to Belarus, but he resisted these attempts. Further, the British authorities refused to grant AM Leave to Remain, which would entitle him to full government benefits. Instead, AM is in 'limbo' status under which (1) he may not seek employment in the UK, (2) he is not entitled to National Health Service benefits, excepting emergency care, (3) he may not open a bank account, (4) he may not enter into a tenancy agreement, and (5) he receives very limited social welfare benefits, at the same level of failed asylum seekers awaiting deportation. Instead, he received a payment card for food, clothing, and toiletries at a subsistence level and government accommodation. As AM may not return to Belarus, he claimed that the British Government's action of placing him in a legal 'limbo' amounted to a denial of his rights under Article 8 of the *European Convention of Human Rights*, and that the Government had to grant him Leave to Remain status that would enable him to obtain full public benefits. Article 8 provides that 'everyone has the right to respect for his private and family life' and that 'there shall be no interference by a public authority in the exercise of this right except as in accordance with law and is necessary in a democratic society in the interests of national security, public safety' - administrative tribunals and then the Court of Appeal agreed with AM, and ordered the Home Secretary to grant AM Leave to Remain status. On review, in a unanimous decision, the Supreme Court reversed the Court of Appeal and held that the Home Secretary did not violate AM's Article 8 rights by placing him in 'limbo' status. The Supreme Court found that AM's attempts to thwart his deportation were highly material factors in evaluating whether the Home Secretary's actions were proportional. The Court added that the

public interest in maintaining effective immigration controls and containing welfare expenditures were relevant considerations. There was also a public interest in maintaining British employment opportunities for those lawfully in the UK. The Court said that, given AM's serious criminal offences, his deportation was in the public interest, and his efforts to undermine that through fraudulent activity were also valid considerations. While AM was entitled to Article 8 protections, the Supreme Court concluded that his extended limbo status was a proportionate means of achieving the lawful aims of the British Government.
R v Secretary of State for the Home Department

Poem for Friday

Song of Hope

By: Thomas Hardy (1840-1928)

O sweet To-morrow! –
After to-day
There will away
This sense of sorrow.
Then let us borrow
Hope, for a gleaming
Soon will be streaming,
Dimmed by no gray –
No gray!

While the winds wing us
Sighs from The Gone,
Nearer to dawn
Minute-beats bring us;
When there will sing us
Larks of a glory
Waiting our story
Further anon –
Anon!

Thomas Hardy, (2 June 1840 - 11 January 1928), author and poet, was born in Dorset, England. His father was a stonemason, and his mother who was well read, educated Thomas to the age of 8, at which time Thomas commenced as a student at Mr Last's Academy for Young Gentlemen. On leaving school at the age of 16, due to his family's lack of finances to fund a university education, Thomas became an apprentice architect. Much of his work involved the restoration of churches. In 1862 he enrolled at King's College, London. He is best known for his novels, including *Far from the Madding Crowd,* (1874) and *Tess of the d'Urbervilles,* (1891). He was appointed a Member of the Order of Merit in 1910 and was nominated for the Nobel Prize in Literature in that year. He received a total of 25 nominations for the Novel Prize for literature during his life. Thomas Hardy died of pleurisy on 11 January 1928. He had wanted his body to be buried with his first wife Emma's remains at Stinsford. She had died in 1912 and much of his poetry was inspired by his feelings of grief following her death. His Executor Sir Sydney Carlyle Cockerell compromised by having Thomas Hardy's heart buried with the remains of his first wife Emma, and his ashes interred at Poets' Corner, Westminster Abbey. At the time of his death his estate was worth 95,418 pounds, the equivalent of over 6 million pounds

today. One of the largest literary societies in the world is the Thomas Hardy Society, based on Dorchester, https://www.hardysociety.org/.

Song of Hope by Thomas Hardy, read by Dylan Pearse, Music by Irish Folk Group, Kern
https://www.youtube.com/watch?v=Q1qo8sWTi6M

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