



Friday, 9 May 2025

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

### 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)

**Woonona-Bulli RSL Memorial Club Ltd v Warrane-Design Construct Fit-Out Pty Ltd** (NSWCA) - Court refused to grant a stay of the primary judge's order that funds a principal had had paid into court should be paid to a builder who had succeeded under the *Building and Construction Industry Security of Payment Act 1999* (NSW)

**Builtcom Construction Pty Ltd v VSD Investments Pty Ltd aff VSD Investments Trust** (NSWCA) - Court of Appeal declined to stay payment out of moneys in Court pending appeal after primary judge rejected challenge to security of payment adjudication



## HABEAS CANEM

New puppy - 2018

# Benchmark

## Summaries With Link (Five Minute Read)

### **Woonona-Bulli RSL Memorial Club Ltd v Warrane-Design Construct Fit-Out Pty Ltd [2025] NSWCA 89**

Court of Appeal of New South Wales  
Griffiths AJA

Security of payments - RSL club entered into cost plus head contract with builder - subcontractor served on the club three District Court debt certificates under *Contractors Debts Act 1997* (NSW) having the effect of assigning the club's obligation to pay the builder to the subcontractor - club paid subcontractor pursuant to these certificates - adjudicator under *Building and Construction Industry Security of Payment Act 1999* (NSW) determined builder entitled to 'upstream' to the club delay costs charged by its subcontractor "" club sought judicial review of security of payment adjudication - primary judge held adjudicator had, at most, made a non-jurisdictional error of law and that the application should be dismissed (see Benchmark 31 March 2025) and that funds the club had paid into Court should mostly be paid to the builder rather than the contractor (see Benchmark 22 April 2025) - club sought a stay of the order regarding payment out of court pending appeal - held: considerable force in the builder's contention that the club's position was relatively weak - balance of convenience weighed heavily in favour of the builder who, contrary to the policy objectives of the *Building and Construction Industry Security of Payment Act*, had still not been paid the money owed to it by the club - Court gave some weight to an accountant's evidence that the builder was solvent, profitable and financially viable - no sufficient basis for granting any stay in respect of the primary judge's order concerning the payment out of monies paid into court.

[View Decision](#)

[From Benchmark Tuesday, 6 May 2025]

### **Builtcom Construction Pty Ltd v VSD Investments Pty Ltd aff VSD Investments Trust [2025] NSWCA 93**

Court of Appeal of New South Wales  
Adamson JA

Security of payment - developer contracted builder for 30-story mixed residential-commercial development - developer terminated contract - builder made final payment claim under *Building and Construction Industry Security of Payment Act 1999* (NSW) - adjudicator ruled developer had to pay about \$8.5 million - builder and developer both sought judicial review - developer paid about \$8.7 million into Court as required by Court order - Court dismissed both builder's and developer's claims with result adjudication determination not set aside (see Benchmark 15 April 2025) - primary judge ordered funds in Court be paid to builder (see Benchmark 1 May 2015), but later stayed the operation of that order for short period - developer now sought continuation of stay from Court of Appeal - held: s32A of the Act permits the Court, on judicial review of adjudicator's decision, to set aside the decision in whole or in part, including setting aside only that part of the decision the Court finds was affected by jurisdictional error - s32A was relevant to the stay application because it bore on the question whether the amount already



awarded by the adjudicator could be reduced on appeal, warranting a stay to protect the developer's right to restitution - if the Court dismissed the appeal, the builder would be entitled to the moneys paid into Court in full - if the Court allowed the appeal and set aside the whole of the adjudicator's decision, the matter would go back to an adjudicator - this was neither the time nor the occasion to predict whether the Court of Appeal might set aside merely part of the adjudicator's decision - Court not persuaded it was appropriate to continue the stay - this was also consistent with the risk allocation policy of the Act - primary judge's stay dissolved and order made that the funds in Court be immediately paid to the builder.

[View Decision](#)

[From Benchmark Wednesday, 7 May 2025]

# Benchmark

## INTERNATIONAL LAW

### Executive Summary and (One Minute Read)

**Mousse v Commission Nationale de L'Informatique et des Libertes (CNIL), SNCF Connect (EUCJ1C)** - The practice of the French national railway SNCF of requiring online ticket purchasers to indicate their title as either Monsieur (Mr) or Madame (Ms) was in violation of the *European Union General Data Protection Regulation (GDPR)* because the collection of this information was not necessary for the performance of the contract for passenger travel and violated the principle of minimisation of data collection

### Summaries With Link (Five Minute Read)

**Mousse v Commission Nationale de L'Informatique et des Libertes (CNIL), SNCF Connect, Case C-394/23**

European Court of Justice

Lenaerts P, von Danwitz VP, Arastey Sahún, Kumin, & Ziemele JJ

When purchasing a ticket online, patrons of the French national rail, the SNCF, were required to tick a box designating gender identity: either Monsieur or Madame. Arguing that this practice violated the *European Union General Data Protection Regulation (GDPR)*, Mousse, an association, filed a complaint with the French data protection authority - the Commission Nationale de L'Informatique et des Libertes (CNIL). After the CNIL rejected the claim, Mousse brought an action before the highest administrative body in France, the Council of State, to have the CNIL determination annulled. In response, the Council of State referred the matter to the European Court of Justice for a preliminary ruling. Under the GDPR, data collection must be limited to what is necessary for the performance of a contract and the legitimate interests of the party collecting the data (the data controller). Here, the SNCF argued that it collected the data because it facilitated personal communication with ticket purchasers. The European Court disagreed with the SNCF, and stated that the collection of personal data must be objectively indispensable in order to enable the proper performance of the contract or necessary for the legitimate interests of the data collector. The Court found that personalisation of commercial communications based on gender as indicated in a purchaser's title did not appear to be objectively indispensable to enable the proper performance of rail transportation. Nor was the data strictly necessary for the legitimate interests of the SNCF. The Court found that the SNCF could instead communicate with patrons by means of generic expressions that have no correlation with gender identity. Under EU law, the matter now reverts to the French Council of State to dispose of the matter in accord with the decision made by the European Court of Justice.

[Mousse](#)



# Benchmark



## Poem for Friday

### Warm Summer Sun

By Mark Twain (1835-1910)

Warm summer sun,  
    Shine kindly here,  
Warm southern wind,  
    Blow softly here.  
Green sod above,  
    Lie light, lie light.  
Good night, dear heart,  
    Good night, good night.

**Mark Twain**, was the pen name of American writer and essayist Samuel Langhorne Clemens. Clemens was born in Florida, Missouri, on 30 November 1835, the sixth of seven children, only four of whom survived into adulthood. His father was a lawyer. Clemens was raised in Hannibal, Missouri. His father, by then a Judge, died when Clemens was 11 years old. After leaving school at age 11 he was an apprentice typesetter to a printer, writing articles, and educating himself in the evening in the public libraries in the cities he lived in. He was later a riverboat pilot, and then a miner for Orion in Nevada. Through his wife Olivia Langdon, Twain became friends with Frederick Douglass, Harriet Beecher Stowe, and William Dean Howells. He part-owned the Buffalo Express. He had a love of science, but lost substantial sums investing in new inventions. Mark Twain's famous novels included the *Adventures of Tom Sawyer* and the *Adventures of Huckleberry Finn*. Ernest Hemingway wrote that "*All modern American literature comes from one book by Mark Twain called Huckleberry Finn*". Mark Twain suffered a deep depression after his son Langdon died at 19 months, in 1872, and then his daughter Susy died in 1896, wife Olivia died in 1904, daughter Jean died on Christmas Eve 1909, and his good friend Henry Rogers died on 20 May 1909. Mark Twain died at the age of 74, on 21 April 1910 of a heart attack. Halley's Comet had passed the earth in the year of his birth in 1835, and passed the earth again in the year of his death in 1910. Mark Twain has been called "*The father of American Literature*".

Mark Twain's very quotable observations include:

"Only two things we'll regret on deathbed – that we are a little loved and little travelled."

"Twenty years from now you will be more disappointed by the things you didn't do than by the ones that you did do"

"Man is the only animal that blushes. Or Needs to."

"A full belly is little worth where the mind is starved."



"Travel is fatal to prejudice"

"The secret of getting ahead is getting started"

"Always do right, it will gratify some people and astonish the rest,"

"Kindness is the language which the deaf can hear and the blind can see"

[Click Here to access our Benchmark Search Engine](#)