

Friday, 18 October 2024

Weekly Construction Law Review

Selected from our Daily
Bulletins covering Construction

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Executive Summary (One Minute Read)

Claire Rewais and Osama Rewais t/as McVitty Grove v BPB Earthmoving Pty Ltd (NSWSC) - a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) was not validly served until two days before an adjudication application, but the adjudication determination was nonetheless valid

Cui v Salas-Photiadis (NSWSC) - order withdrawing caveat refused after parties let settlement go through in PEXA while the caveat was in place

PACT Construction Pty Ltd v Australian Securities and Investments Commission (WASC) - principal to construction contract reinstated after it was deregistered before a dispute about the final payment claim under the contract was resolved

HABEAS CANEM

Peace



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Summaries With Link (Five Minute Read)

Claire Rewais and Osama Rewais t/as McVitty Grove v BPB Earthmoving Pty Ltd [2024] NSWSC 1271

Supreme Court of New South Wales

McGrath J

Security of payments - the plaintiffs engaged the defendant builder - the builder claimed to have served a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) - when the plaintiffs did not reply with a payment schedule within the required time, the builder elected to seek adjudication - the plaintiffs denied having received the payment claim, served a payment schedule, and contended the adjudication would be invalid - the adjudicator decided he did have jurisdiction and determined that the plaintiffs should pay the full amount claimed - the plaintiffs sought judicial review - held: s31 of the Act provides for service of documents under the Act, including payment claims and payment schedules - the builder had the burden of proof of showing it had a cause of action under s14, and this includes showing valid service - if a document has actually been received and come to the attention of a person to be served, it does not matter whether or not any statutory requirements for service have been complied with and in such a case there has been service - the builder had not proved that the payment claim was served in accordance with s31(1)(d) (concerning service by email) or that the payment claim was brought to the plaintiffs' attention until two days before the adjudication application - s31(1)(d) did not apply because one of the plaintiffs had provided the relevant email address the purpose of receiving a quote or estimate, but not for the purposes of receiving documents under the Act - the *Electronic Transactions Act 2000* (NSW) did not assist the builder, as the relevant provisions of that Act merely govern the form of electronic communications and the deemed time of receipt, and that Act does not affect s31 or bear on whether the recipient received actual notice - although the adjudication application was filed prematurely, all the "essential requirements" for validity of an adjudication had been met - the adjudicator dealt with the parties' submissions comprehensively, demonstrating a bona fide attempt to exercise his power - the decision was not void simply because his decision as to the timing of service and whether the adjudication application was made in time was erroneous - the builder was not barred by the *Home Building Act 1989* (NSW) from enforcing the determination as it was in the nature of a "pay now, litigate later" statutory entitlement, and was not equivalent to an award of damages or any other remedy for breach of contract - proceedings dismissed.

[View Decision](#)

[From Benchmark Monday, 14 October 2024]

Cui v Salas-Photiadis [2024] NSWSC 1280

Supreme Court of New South Wales

Hmelnitsky J

Caveats - the plaintiff entered into a contract to purchase a home from the second defendant, borrowing funds from a bank who was to be the incoming mortgagee - the first defendant lodged a caveat over the property, relying on an interest under a "charge" granted under a loan

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agreement relating to building work done by the first defendant - no participant in the PEXA workspace noticed that the first defendant's caveat had been lodged - on settlement in PEXA, documents were lodged with Land Registry Services, and the funds were disbursed in accordance with the financial settlement schedule - the following day, the bank received a requisition from Land Registry Services informing it that the transfer and mortgage could not be registered because of the first defendant's caveat - the plaintiff sought an order that the caveat be withdrawn under s74MA of the *Real Property Act 1900* (NSW) - held: an equitable charge may or may not take the form of an equitable mortgage - the caveator's reference to a "charge" in the caveat did not necessarily invoke the definition of "Charge" in the *Real Property Act* - the caveat therefore did not fail sufficiently to specify the first defendant's claimed interest merely because it described a claimed equitable mortgage as a charge - under s7D of the *Home Building Act 1989* (NSW), an agreement which purports to grant security for the payment of the consideration payable under a contract to do residential building work is an "other agreement" within the meaning of that provision - the loan agreement here was therefore within the scope of s7D to the extent it purported to secure payment for residential building work - however, s7D left the balance of the loan agreement intact - the mere failure of the caveat to specify the amount secured is not a sufficient reason to set the caveat aside - the first defendant had demonstrated that it had a good arguable case that the caveat had substance - the balance of convenience favoured the continuation of the caveat until such time as the rights of the parties can be dealt with on a final basis, which would inevitably include a contest as to the parties' competing priorities - order under s74MA refused and matter listed for directions on the Real Property List.

[View Decision](#)

[From Benchmark Wednesday, 16 October 2024]

PACT Construction Pty Ltd v Australian Securities and Investments Commission [2024] WASC 369

Supreme Court of Western Australia

Strk J

Corporations law - PACT was a company that performed commercial building works - Pact, as builder, entered into a construction contract with Iris Mabel Park Pty Ltd (as principal) for the construction of a large mixed use apartment development - after practical completion, an application was made to voluntarily deregister Iris Mabel - the superintendent under the contract then issued a site instruction to PACT that the defects liability period under the contract had expired - this was the contractual trigger for PACT to issue a final payment claim to Iris Mabel, and PACT did so - a dispute arose between PACT and Iris Mabel concerning variations and liquidated damages under the contract - Iris Mabel was then deregistered, and its parent company paid the amount that Iris Mabel said was payable - PACT issued a notice of dispute under the contract and requested that Iris Mabel attend a conference with PACT in the presence of the superintendent to try to resolve the dispute - the parent company informed PACT that Iris Mabel had been deregistered - ASIC rejected applications by both the former directors of Iris Mabel and PACT that Iris Mabel be reinstated - PACT applied to the Court for reinstatement of Iris Mabel - held: s601AH(2) of the Corporations Act 2001 (Cth) provides that

an application may be made to the Court for a company to be reinstated by a person who is aggrieved by the deregistration or a former liquidator of the company - the Court has a discretion whether to make the order - the term 'person aggrieved' is not expressly defined in the Act and should not be construed narrowly - the Court must consider whether PACT had shown that deregistration has deprived it of something, or injured or damaged it in a legal sense, or that it became entitled in a legal sense to regard the deregistration as the cause of dissatisfaction - the deregistration of Iris Mabel deprived PACT of its right to pursue outstanding claims against Iris Mabel under the contract dispute resolution mechanism - the completed application for voluntary deregistration was lodged by Iris Mabel before the expiry of the defects liability period - there was nothing to suggest any person would be prejudiced by reinstatement - it would not be in the public interest if the voluntary deregistration of the company were to defeat creditors, potential creditors, and the proper dealing of the extant claims - the Court was satisfied that it was 'just' to order the reinstatement of Iris Mabel - reinstatement ordered.

[PACT Construction Pty Ltd](#)

[From Benchmark Thursday, 17 October 2024]

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INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Aquino v Bondfield Construction Co (SCC) - The fraudulent intent of a senior employee, found to be the directing mind of companies, can be attributed to the companies in a bankruptcy proceeding

Summaries With Link (Five Minute Read)

Aquino v Bondfield Construction Co 2024 SCC 31

Supreme Court of Canada

Wagner CJ, Karakatsanis, Côté, Rowe, Martin, Jamal, & O'Bonsawin JJ

The President of two family-owned construction companies had for years fraudulently taken tens of millions of dollars from the companies through a false invoicing scheme. In subsequent bankruptcy proceedings against the companies, the payments made under the invoicing scheme were challenged under the *Bankruptcy and Insolvency Act*. Under the Act, money paid by the debtor can be recovered if the transfers were made at undervalue with the intent to defraud creditors. The lower court concluded that these were payments made at undervalue with fraudulent intent. The bankrupt entities contended that the payments were made to creditors and that fraudulent intent was not present. The Court held that the executive's fraudulent intent could be attributed to the bankrupt companies and that the money should be paid back. The Supreme Court (Jamal J, joined by Wagner CJ, Karakatsanis, Côté, Rowe, Martin, O'Bonsawin JJ) dismissed the appeal and held that the courts could find that a debtor intended to defraud creditors even if the debtor was not insolvent at the time of the undervalue transfers. Specifically, the executive's fraudulent intent should be attributed to the debtor companies because he was their directing mind. The Supreme Court stated that the test for corporate attribution is simply whether the executive was the directing mind of the business and whether the actions were performed within the corporate responsibility assigned to him. If so, the fraudulent intent of the executive could be attributed to the corporation.

[Aquino](#)



Poem for Friday

In My Craft or Sullen Art

By Dylan Thomas (1914-1953)

In my craft or sullen art
Exercised in the still night
When only the moon rages
And the lovers lie abed
With all their griefs in their arms,
I labour by singing light
Not for ambition or bread
Or the strut and trade of charms
On the ivory stages
But for the common wages
Of their most secret heart.
Not for the proud man apart
From the raging moon I write
On these spindrift pages
Nor for the towering dead
With their nightingales and psalms
But for the lovers, their arms
Round the griefs of the ages,
Who pay no praise or wages
Nor heed my craft or art.

Dylan Marlais Thomas, poet, writer and broadcaster, was born on 27 October 1914 in Swansea, Glamorgan, Wales. His well-known works include *Under Milk Wood*, "a play for voices", *Do not go gentle into that good night*, and, *And death shall have no dominion*. He loved Wales but was not a Welsh nationalist. His father wrote that he was "*afraid Dylan isn't much of a Welshman*". Robert Lowell, wrote of criticism of Thomas' greatness as a poet, "Nothing could be more wrongheaded than the English disputes about Dylan Thomas's greatness...He is a dazzling obscure writer who can be enjoyed without understanding." The Welsh Academy Encyclopedia of Wales described him, and particularly his life in New York City before his death as a "roistering, drunken and doomed poet."

Dylan Thomas reads "In My Craft or Sullen Art"

<https://www.youtube.com/watch?v=Tiw3uOT2eUc>

Read by **Colin McPhillamy**, actor and playwright. Colin was born in London to Australian



parents. He trained at the Royal Central School of Speech and Drama in London. In the UK he worked in the West End, at the Royal National Theatre for five seasons, and extensively in British regional theatre. In the USA he has appeared on Broadway, Off-Broadway and at regional centres across the country. Colin has acted in Australia, China, New Zealand, and across Europe. Colin is married to Alan Conolly's cousin Patricia Conolly, the renowned actor and stage

actress: https://en.wikipedia.org/wiki/Patricia_Conolly and <https://trove.nla.gov.au/newspaper/article/47250992>.

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