

Friday, 26 April 2024

Weekly Construction Law Review Selected from our Daily Bulletins covering Construction

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Executive Summary (One Minute Read)

The Owners - Strata Plan No 64757 v Sydney Remedial Builders Pty Ltd (NSWCA) - leave to appeal refused from the decision of the primary judge to reject the report of a referee in a building and construction case

HABEAS CANEM

Country smile



Summaries With Link (Five Minute Read)

The Owners - Strata Plan 64757 v Sydney Remedial Builders Pty Ltd [2024] NSWCA 85

Court of Appeal of New South Wales

Leeming & Payne JJA

Home building - the defendant builder was retained to remedy building defects caused by the original builder - the applicant owners corporation commenced proceedings under s48MA of the *Home Building Act 1989* (NSW), seeking damages in respect of defective building works - the parties reached agreement on quantum - the only issue was whether the proceedings were commenced within time - this issue was referred to a referee for separate determination - the referee concluded that the date of practical completion of the works was 16 March 2012, and that the proceedings were therefore commenced within the time required by s18E of the *Home Building Act*, that is, before 16 March 2019 - the applicant contended that the Court should accept the referee's report under r20.24(a) of the *Uniform Civil Procedure Rules 2005* (NSW) - the defendant contended the Court should reject the referee's report - the primary judge dismissed the proceedings (see Benchmark 20 September 2023) - the applicant sought leave to appeal from the decision of the primary judge to reject the report of the referee - held: one reason for the requirement in UCPR r51.12(4) for the summary of argument filed with in relation to an application for leave to appeal to state the questions involved is to permit the Court to determine whether there should be a concurrent hearing or, as occurred in the present case, a hearing of the application for leave before the Court constituted by two Judges of Appeal - another reason is to permit the merits of the application for leave to be fully and fairly ventilated at a relatively short hearing for leave - a third reason is to enable the respondent to know the case it is called upon to meet, as well as to determine whether the White Folder filed in relation to the application for leave is to be supplemented - it should not be thought that it will invariably be possible to conduct the hearing as occurred in this case, based on materials supplied the preceding day, and on the basis of submissions advanced for the first time in any detail on the day of hearing - such a course was only adopted in this case as a consequence of the constructive approach adopted by both sides' counsel in their oral address - the primary judge had applied s3B of the *Home Building Act* in accordance with its terms, and had correctly identified that the terms "completion" of the building work and "practical completion" of the building work are deployed separately within the section - it was true that "completion" under s3B was not determined solely by the form of the contract, and, in principle, the parties could choose another word to define something which amounted to "completion" for the purposes of s3B(1), but that theoretical possibility was well removed from the facts of this case and did not assist the applicant - leave to appeal refused.

[View Decision](#)

[From Benchmark Tuesday, 23 April 2024]

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INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Kirkorov v Lithuania (Eur Ct HR) - Decision of Lithuania to deny entry to Russian entertainer on national security grounds did not amount to a violation of Article 10 (freedom of expression) of the *European Convention on Human Rights*

Summaries With Link (Five Minute Read)

Kirkorov v Lithuania, ECHR 096 (2024)

European Court of Human Rights

Bårdsen P, Ilievski, Kuris, Yüksel, Schembri Orland, Krenc, & Derencinovic JJ

Kirkorov was a popular singer from Russia who had been found by the Lithuanian Migration Department to have publicly supported Vladimir Putin and supported Russia's actions in Crimea. The government of Lithuania placed Kirkorov on a list of aliens barred from entering the country. Kirkorov unsuccessfully challenged this decision in the Lithuanian courts. Kirkorov then brought proceedings before the European Court of Human Rights alleging that the actions of Lithuania violated his right to freedom of expression guaranteed by Article 10 of the *European Convention of Human Rights*. Article 10 provides that everyone has the right to freedom of expression without interference by public authority and regardless of frontiers. However, these rights may be subject to such restrictions as are prescribed by law "and are necessary in a democratic society, in the interests of national security' or public safety. The European Court found that, while the right of a foreigner to remain in a country is not a Convention right, 'immigration controls must be exercised consistently with Convention obligations'. The Court ruled that the ban on entry was materially related to the right of expression because, under Article 10, no distinction can be drawn between nationals and foreigners. As entry to Lithuania was denied on the basis of Kirkorov's past statements, the Court found that there had been an interference with his Article 10 rights. The issue came down to whether Lithuania's actions were permissible as being prescribed by law and necessary in the interests of national security. The Court found that Lithuania's actions were prescribed by law that purported to be based on national security. Nevertheless, it was for the courts to determine whether the invocation of national security had a reasonable basis or was contrary to common sense. The Court concluded that there had not been a violation of Article 10 in light of the careful scrutiny by the Lithuanian courts to the claim that Kirkorov represented a threat to national security. Further, the European Court held that the measures taken by Lithuania were not disproportionate and that the national courts had properly weighed the interests of national security against the measures taken against Kirkorov.

[Kirkorov](#)



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Poem for Friday

The Song of a Comet

By: Clark Ashton Smith (1893-1961)

A plummet of the changing universe,
Far-cast, I flare
Through gulfs the sun's uncharted orbits bind,
And spaces bare
That intermediate darks immerse
By road of sun nor world confined.
Upon my star-undominated gyre
I mark the systems vanish one by one;
Among the swarming worlds I lunge,
And sudden plunge
Close to the zones of solar fire;
Or 'mid the mighty wrack of stars undone,
Flash, and with momentary rays
Compel the dark to yield
Their aimless forms, whose once far-potent blaze
In ashes chill is now inurned.



A space revealed,
I see their planets turned,
Where holders of the heritage of breath
Exultant rose, and sank to barren death
Beneath the stars' unheeding eyes.
A down contiguous skies
I pass the thickening brume
Of systems yet unshaped, that hang immense[67]
Along mysterious shores of gloom;
Or see—unimplicated in their doom—
The final and disastrous gyre
Of blinded suns that meet,
And from their mingled heat,
And battle-clouds intense,
O'erspread the deep with fire.

Through stellar labyrinths I thrid
Mine orbit placed amid
The multiple and irised stars, or hid,
Unsolved and intricate,
In many a planet-swinging sun's estate.



Ofttimes I steal in solitary flight
Along the rim of the exterior night
That grips the universe;
And then return,
Past outer footholds of sidereal light,
To where the systems gather and disperse;
And dip again into the web of things,
To watch it shift and burn,
Hearted with stars. On peaceless wings
I pierce, where deep-outstripping all surmise,
The nether heavens drop unsunned,
By stars and planets shunned.
And then I rise
Through vaulting gloom, to watch the dark
Snatch at the flame of failing suns;
Or mark
The heavy-dusked and silent skies,[68]
Strewn thick with wrecked and broken stars,
Where many a fated orbit runs.
An arrow sped from some eternal bow,
Through change of firmaments and systems sent,



And finding bourn nor bars,

I flee, nor know

For what eternal mark my flight is meant.

Clark Ashton Smith was born on 13 January, 1893, in Long Valley, Placer County, California. Largely self-taught, he began writing at a very young age, acquiring an exceptionally large vocabulary by reading the dictionary from cover to cover. A protégé of the San Francisco poet George Sterling, Smith achieved recognition at the age of 19 for his collection of poems *The Star Treader* (1912), influenced by Baudelaire, Poe and Sterling. Smith always considered himself a poet first and foremost, however, following the Great Depression, he later turned to writing short stories for pulp magazines such as *Weird Tales* as this was a more lucrative source of income to support himself and his aging parents. He wrote more than 100 short stories between 1929 and 1934, and it is this, along with his friendship with fellow *Weird Tales* contributor H. P. Lovecraft, for which he is remembered today. Smith lived most of his life in Auburn, California, and passed away in his sleep on 14 August 1961, at the age of 68. In addition to his literary activities, he created a large number of drawings, paintings and sculptures which reflected the otherworldly atmosphere of his tales.

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