

Friday, 28 June 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 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)

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

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

HABEAS CANEM

First beach holiday



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Summaries With Link (Five Minute Read)

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 "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](#)

[From Benchmark Tuesday, 25 June 2024]

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](#)

[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 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](#)

[From Benchmark Thursday, 27 June 2024]

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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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