



Friday, 26 April 2024

## **Weekly Corporate Governance** **A Weekly Bulletin listing Decisions** **of Superior Courts of Australia covering Corporate Governance** **Law**

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### **Executive Summary (One Minute Read)**

**Clubb (administrator), in the matter of Town Tavern Blacktown Pty Limited (administrators appointed) (receivers and managers appointed) (FCA)** - the Court extended the date of the convening period for the second meeting of creditors for a group of companies in administration

**Fitzgerald, in the matter of Tempo Holidays Pty Ltd (in liq) v Tully (FCA)** - insurer not liable for settlement of breach of director's duties claim, as it had not been shown it was reasonable, or that the case against the director would have succeeded

## HABEAS CANEM

### Country smile



# Benchmark

## Summaries With Link (Five Minute Read)

### **Clubb (administrator), in the matter of Town Tavern Blacktown Pty Limited (administrators appointed) (receivers and managers appointed) [2024] FCA 405**

Federal Court of Australia

Halley J

Corporations - a company and five related entities comprised a corporate group that carried on a licensed hotel business in Western Sydney known as the Phoenix Town Tavern Blacktown - the Company leased premises in Blacktown and held assets necessary to conduct the business, including poker machines, gaming machine entitlements and licenses, financed motor vehicles, and bar equipment - Robin Hood Blacktown operated as a management services entity for the company - the assets of the companies comprising the group were intertwined, and the Company leased the premises but Robin Hood Blacktown conducted its operations - the company had a liquor licence, poker machine permit, and was the lessee pursuant to equipment lease agreements - members of the group (including the Company) entered into various agreements, including a subscription agreement and a further subscription agreement with Nomura Special Investments Singapore Pte Limited, to raise funds - in due course, Nomura issued notices of default and a demand for unpaid amounts - a security trustee appointed receivers and managers of all the assets and undertakings of the company and Robin Hood Blacktown, and then to all members of the group - the administrators sought, pursuant to s439A(6) of the *Corporations Act 2001* (Cth), that the date of the convening period as defined by s439A(5) of that Act, for the second meeting of creditors of required under s439A of the Act (Second Meeting) be extended - held: the object of Part 5.3A of the *Corporations Act* is to maximise the chance of a company continuing in existence, or, if that is not possible, obtain a better return for the company's creditors and members than would result from an immediate winding up - in exercising the jurisdiction to extend the convening period: (a) the Court is required to balance the interests of creditors in a timely administration; and (b) the need to allow sufficient time to administrators to carry out their functions properly and maximise the benefits to creditors through a proper administration - the extension sought would enable an orderly and comprehensive sales campaign to be undertaken consistently with the sale program developed by the receivers - it would also preserve the ability of the administrators to structure the sale of the group, including by way of a deed of company arrangement, which could not be utilised without the company remaining in administration - it would also enable the administrators to take advantage of the regime provided by Part 5.3A, in particular the moratorium on the enforcement of debts, the avoidance of liabilities that crystallise upon the company entering into liquidation, thereby allowing the administrators to retain its assets necessary to conduct the business - extension made as sought by the administrators.

[Clubb](#)

[From Benchmark Tuesday, 23 April 2024]

### **Fitzgerald, in the matter of Tempo Holidays Pty Ltd (in liq) v Tully [2024] FCA 391**

Federal Court of Australia

McElwaine J

Insolvency - Tempo's liquidator brought claims against Tully, a former director, for (1) breach of statutory and fiduciary duties by failing to monitor the inter-group transfer of funds pursuant to an informal debtor/creditor arrangement, under which debts were unsecured and became unrecoverable; and (2) insolvent trading under s588M of the *Corporations Act 2001* (Cth) - the insurer under a Management Liability Insurance Policy declined to indemnify Tully for breach of the director's duty claim (it was not in issue that it had no liability to indemnify Tully for the insolvent trading claim) - the proceedings settled with Tully consenting to judgment for about \$6million on the director's duty claim and about \$24million on the insolvent trading claim, with the liquidator agreeing to enforce the judgment first against the insurer, and after that only against a security sum of \$500,000 provided by Tully - the liquidator sought to recover from the insurer - held: indemnity was provided on a claims made and notified basis - courts "allow some leeway" in requiring correlation between an original demand and the way in which a claim is ultimately pleaded - the demand that the liquidator had originally sent Tully for payment of about \$5million for breach of director's duties and/or insolvent trading was not of a different legal and factual character than the claim now sought to be made against the insurer - for a claim to be made within the meaning of the policy, no more was required than a written demand against an insured person for compensation or damages - what amounts to a claim is a question of fact, and there is no magic formula - although Tully's liability under the settlement was capped at \$500,000, the insurer appropriately did not contend that its liability was also so limited - the liquidator's evidence as to the reasonableness of the settlement was insufficient - the settlement was therefore not a basis to claim against the insurer - whether one concentrated on the content of Tully's duties as pleaded or on the more expansive framing of the claim in the liquidator's closing submissions, the evidence was insufficient to make good either of breach of duty cases pursuant to s180 or s181 of the *Corporations Act* - the liquidator also failed to prove that any contravention by Tully resulted in damage being suffered by Tempo - further, Tempo had been aware of four matters that a reasonable person in the circumstances could be expected to know were relevant to the insurer's decision to accept the risk and on what terms - therefore, Tempo had breached its duty of disclosure under s21 of the *Insurance Contracts Act 1984* (Cth) - proceedings dismissed.

<https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2024/2024fca0391>

[From Benchmark Wednesday, 24 April 2024]



# Benchmark

## 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](#)





## 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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