



Friday, 11 October 2024

Weekly Government Review A Weekly Bulletin listing Decisions of Superior Courts of Australia covering government

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Executive Summary (One Minute Read)

HBSY Pty Ltd v Lewis (HCA) - s7(5) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) requires all appeals from State Supreme Courts involving matters arising under certain Commonwealth legislation be heard by the relevant federal court, irrespective of the State Supreme Court's source of jurisdiction

Abedini v Commissioner of AFP (VSCA) - constructive trust claim by the wife of a person who had largely provided the purchase price of property later forfeited under the *Proceeds of Crime Act 2002* (Cth) failed



HABEAS CANEM

Before the puppy ears finally dropped

Summaries With Link (Five Minute Read)

HBSY Pty Ltd v Lewis [2024] HCA 35

High Court of Australia

Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot, & Beech-Jones JJ

Jurisdiction - an executor and beneficiary named in a will caused loss to the estate in breach of fiduciary duty - an administrator was later appointed - the former executor became bankrupt, and his interest in the estate was sold to HSBY - HSBY commenced proceedings in the NSW Supreme Court seeking to revoke the letters of administration - the administrator cross-claimed, contending that HSBY was not entitled to any distribution until the loss was made good - HSBY said the former executor's liability to the estate had been extinguished under the *Bankruptcy Act 1966* (Cth) - the Supreme Court found in favour of the administrator - HSBY considered an appeal would concern a matter arising under the *Bankruptcy Act*, and so an appeal only lay to the Full Court of the Federal Court pursuant to s7(5) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) - HSBY sought an extension of time to appeal to the Full Court, which held it did not have jurisdiction to hear the appeal - HSBY sought writs of certiorari and mandamus from the High Court requiring the Full Court to hear the appeal - held (by majority, Gageler CJ dissenting): s24(1)(c) of the *Federal Court of Australia Act 1976* (Cth) gives the Federal Court jurisdiction to hear appeals from State Supreme Court judgments where this is provided by any other Act - s7(5) of the *Jurisdiction of Courts (Cross-vesting) Act* provides that, if it appears that an appeal from a single judge of a State Supreme Court would involve a matter arising under certain Commonwealth legislation (including the *Bankruptcy Act*), that appeal can only be heard by the Federal Court, the Federal Circuit and Family Court of Australia (Division 1), or, by special leave, the High Court - the Federal Court had erred by reading down s7(5) so that it applies only to cases where the single judge of a State Supreme Court was exercising cross-vested federal jurisdiction under s4(1) of the *Jurisdiction of Courts (Cross-vesting) Act* - s7(5) applies irrespective of the source of the Supreme Court's jurisdiction - writs of certiorari and mandamus issued requiring the Federal Court to hear and determine the appeal.

[HBSY Pty Ltd](#)

[From Benchmark Thursday, 10 October 2024]

Abedini v Commissioner of AFP [2024] VSCA 230

Court of Appeal of Victoria

McLeish, Lyons, & Kaye JJA

Equity - in 2011, a purchaser bought a property - in 2014, the County Court granted the Commissioner of the AFP a restraining order in respect of the property under the *Proceeds of Crime Act 2002* (Cth) - Abedini had paid most of the purchase price and mortgage repayments - Abedini became bankrupt - Abedini's wife applied for exclusion from the restraining order and other relief - the Commissioner applied for the property to be forfeited - the County Court refused each of the wife's applications, and ordered the property be forfeited - the wife sought leave to appeal, claiming an equitable interest arising from a remedial constructive trust of the kind discussed by the High Court in *Muschinski v Dodds* and *Baumgartner v Baumgartner* -

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held: at no time in the hearing in the County Court did the wife seek to rely on an interest arising from a constructive trust, whether based on a common intention, or in the form of a remedial constructive trust, and the primary judge had herself raised this issue - if the wife were permitted to rely on such an interest at this stage of the proceeding, this would not only be unfair to the Commissioner but it would also significantly undermine the public interest in the finality of judicial proceedings at first instance - for this reason the wife sought to rely on a remedial constructive trust, rather than a common interest constructive trust - this form of constructive trust precludes a person from asserting a legal right in circumstances where that assertion would constitute unconscionable conduct - the principle operates where a joint relationship or endeavour is removed without attributable blame and where the benefit of property contributed by one party for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party where this was not intended - the principle does not leave the court at large to indulge in subjective notions of fairness - although the affidavit of the wife at first instance alleged facts said to give rise to a remedial constructive trust, the wife should not have an opportunity to argue this now where it was not argued at first instance - the primary judge had not applied an incorrect test for hardship under the *Proceeds of Crime Act*, and had been correct to find that the wife had not demonstrated the requisite hardship - fresh evidence the wife sought to lead as to her children's autism would not change the result - leave to appeal refused.

[Abedini](#)

[From Benchmark Wednesday, 9 October 2024]

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INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Paki Nikora v Tamati Kruger (NZSC) - The Maori Land Court had jurisdiction to review the election of trustees to the Tuhoe - Te Uru Tamatua Trust inasmuch as the Trust, among other functions, held land as a post-settlement governance entity

Summaries With Link (Five Minute Read)

Paki Nikora v Tamati Kruger [2024] NZSC 130

Supreme Court of New Zealand

Winkelmann, CJ, Glazebrook, Williams, O'Regan, & Collins JJ

Paki Nikora contended that two of the trustees of the Tuhoe - Te Uru Taumatua Trust (TUT) had not been selected in accordance with the terms of the trust. Nikora commenced proceedings in the Maori Land Court and the Court ordered fresh elections. TUT refused to acknowledge the jurisdiction of the Land Court and declined to participate in the proceedings. The matter was appealed to the Maori Appellate Court that upheld the decision of the Land Court. However on subsequent review by the Court of Appeal, the decisions of the Maori Land Court and Appellate Court were overturned. The Court of Appeal found that, inasmuch as TUT had authority over a wide range of matters and was not constituted in respect of land and its primary purpose did not relate to land, the Maori Land Court lacked jurisdiction with respect to trust activities. On further review, the Supreme Court determined that the Court of Appeal was in error and concluded that the Maori Land Court had jurisdiction to hear the matter because, from its outset, TUT was established to hold parcels of land regardless of its holdings at the time of its inception. The Court also noted that the Maori Land Court by long experience was sensitive to the challenges of communal asset management and that Maori Land Court judges had special knowledge and expertise and had proceeded with due care to resolve the issues despite the lack of participation by one of the parties.

[Paki Nikora](#)



Poem for Friday

Risk

By Anaïs Nin (1903-1977)

And then the day came,
when the risk
to remain tight
in a bud
was more painful
than the risk
it took
to blossom.

Anaïs Nin, (Angela Anaïs Juana Antolina Rosa Edelmira Nin y Culmell), was born in 1903, outside Paris, of Cuban parents. Her father was the composer, Joaquin Nin. Nin was a French Cuban American who wrote essays, novels and short stories. *The Diary of Anaïs Nin* was written initially as a letter to her father, who had left the family some years before Anaïs Nin wrote, starting at the age of 11 in 1914. The diary of Anaïs Nin was published over 7 volumes, in expurgated and unexpurgated volumes. She was a close friend of Henry Miller. She died in Los Angeles, USA, of cancer.

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.

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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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