



Friday, 3 May 2024

Weekly Intellectual Property Law A Weekly Bulletin listing Decisions of Superior Courts of Australia covering Intellectual Property Law

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Executive Summary (One Minute Read)

MSA 4x4 Accessories Pty Ltd v Clearview Towing Mirrors Pty Ltd (No 2) (FCA) - a cross-claim for invalidity of a patent was so bound up with the original claim for infringement of the patent that the Court should depart from the usual rule that infringement and invalidity claims should be treated separately for costs purposes

HABEAS CANEM

Panting pooches



Benchmark

Summaries With Link (Five Minute Read)

MSA 4x4 Accessories Pty Ltd v Clearview Towing Mirrors Pty Ltd (No 2) [2024] FCA 417

Federal Court of Australia

Downes J

Costs in patents cases - the applicants sued for infringement of a patent for storing or holding items in vehicles typically used by off-road enthusiasts and tradespersons - the respondent denied infringement, and claimed the patent was invalid, unjustified threats, and misleading or deceptive conduct - the Court had held that, on the proper construction of the patent, it was valid, as it did not lack novelty or an inventive step, and the relevant claim was fairly based on the matter described in the specification, given the Court's construction, and, further, the applicants had not discharged their onus of showing their threats of legal proceedings were justified, and the applicants making an announcement to customers and prospective customers that they had commenced the proceedings had contravened s18 of the *Australian Consumer Law* by engaging in misleading or deceptive conduct in trade or commerce (see Benchmark 30 January 2024) - the Court now determined costs - held: claims for patent infringement and invalidity are typically treated as separate events upon which the ordinary rule that costs follows the event applies - however, this is not an immutable principle - departure from the ordinary rule can be justified where there is a common substratum of fact, or the issues are wrapped up with one another or could not be readily disentangled - in this case, the cross-claim for invalidity was responsive to the infringement claim, and was therefore defensive - the claims the respondent had sought to invalidate were only those the applicants relied on for infringement - had the applicants' proposed construction been accepted, the respondent's invalidity claim would have succeeded on the ground of lack of fair basis - two of the three prior art documents relied upon by the respondent with respect to its novelty case were only advanced upon the constructions relied upon by the applicants in prosecuting their infringement claim - the preponderance of the expert evidence dealt with questions that related to both the infringement and invalidity claims, including construction - the outcome of the case is by far the most important factor which courts have viewed as guiding the exercise of the costs discretion - a global costs order covering both the infringement and invalidity claims was is the just and appropriate one - there should be a discount of 40% to take into account that the respondent advanced an obviousness case, which was not tethered to any construction issues, which broadened the scope of the controversy and which failed - applicants to pay 60% of the respondent's costs.

[MSA 4x4 Accessories Pty Ltd](#)

[From Benchmark Friday, 3 May 2024]

Benchmark

INTERNATIONAL LAW

Executive Summary and (One Minute Read)

R v Secretary of State for the Home Department (UKSC) - Failed asylum seeker who committed criminal acts within the UK and who thwarted his deportation was lawfully refused government benefits and was not denied his rights under the *European Convention on Human Rights*

Summaries With Link (Five Minute Read)

R v Secretary of State for the Home Department [2024] UKSC 13

Supreme Court of the United Kingdom

Lord Lloyd-Jones, Lord Sales, Lord Hamblen, Lord Stephens, and Lady Simler

AM was a national of Belarus. He arrived in the UK in 1998 and claimed asylum. In 2000, he was denied asylum status and removed to Belarus. He was denied entry to Belarus and returned to the UK because he provided Belarus officials with false information that caused the officials to believe that he was not a citizen. Upon his return to the UK, he committed various criminal offences and was classified as a foreign criminal by British authorities. The Government desired to extradite AM to Belarus, but he resisted these attempts. Further, the British authorities refused to grant AM Leave to Remain, which would entitle him to full government benefits. Instead, AM is in 'limbo' status under which (1) he may not seek employment in the UK, (2) he is not entitled to National Health Service benefits, excepting emergency care, (3) he may not open a bank account, (4) he may not enter into a tenancy agreement, and (5) he receives very limited social welfare benefits, at the same level of failed asylum seekers awaiting deportation. Instead, he received a payment card for food, clothing, and toiletries at a subsistence level and government accommodation. As AM may not return to Belarus, he claimed that the British Government's action of placing him in a legal 'limbo' amounted to a denial of his rights under Article 8 of the *European Convention of Human Rights*, and that the Government had to grant him Leave to Remain status that would enable him to obtain full public benefits. Article 8 provides that 'everyone has the right to respect for his private and family life' and that 'there shall be no interference by a public authority in the exercise of this right except as in accordance with law and is necessary in a democratic society in the interests of national security, public safety' - administrative tribunals and then the Court of Appeal agreed with AM, and ordered the Home Secretary to grant AM Leave to Remain status. On review, in a unanimous decision, the Supreme Court reversed the Court of Appeal and held that the Home Secretary did not violate AM's Article 8 rights by placing him in 'limbo' status. The Supreme Court found that AM's attempts to thwart his deportation were highly material factors in evaluating whether the Home Secretary's actions were proportional. The Court added that the



public interest in maintaining effective immigration controls and containing welfare expenditures were relevant considerations. There was also a public interest in maintaining British employment opportunities for those lawfully in the UK. The Court said that, given AM's serious criminal offences, his deportation was in the public interest, and his efforts to undermine that through fraudulent activity were also valid considerations. While AM was entitled to Article 8 protections, the Supreme Court concluded that his extended limbo status was a proportionate means of achieving the lawful aims of the British Government.

[R v Secretary of State for the Home Department](#)



Poem for Friday

Song of Hope

By: Thomas Hardy (1840-1928)

O sweet To-morrow! –
After to-day
There will away
This sense of sorrow.
Then let us borrow
Hope, for a gleaming
Soon will be streaming,
Dimmed by no gray –
No gray!

While the winds wing us
Sighs from The Gone,
Nearer to dawn
Minute-beats bring us;
When there will sing us
Larks of a glory
Waiting our story
Further anon –
Anon!

Thomas Hardy, (2 June 1840 - 11 January 1928), author and poet, was born in Dorset, England. His father was a stonemason, and his mother who was well read, educated Thomas to the age of 8, at which time Thomas commenced as a student at Mr Last's Academy for Young Gentlemen. On leaving school at the age of 16, due to his family's lack of finances to fund a university education, Thomas became an apprentice architect. Much of his work involved the restoration of churches. In 1862 he enrolled at King's College, London. He is best known for his novels, including *Far from the Madding Crowd*, (1874) and *Tess of the d'Urbervilles*, (1891). He was appointed a Member of the Order of Merit in 1910 and was nominated for the Nobel Prize in Literature in that year. He received a total of 25 nominations for the Nobel Prize for literature during his life. Thomas Hardy died of pleurisy on 11 January 1928. He had wanted his body to be buried with his first wife Emma's remains at Stinsford. She had died in 1912 and much of his poetry was inspired by his feelings of grief following her death. His Executor Sir Sydney Carlyle Cockerell compromised by having Thomas Hardy's heart buried with the remains of his first wife Emma, and his ashes interred at Poets' Corner, Westminster Abbey. At the time of his death his estate was worth 95,418 pounds, the equivalent of over 6 million pounds



today. One of the largest literary societies in the world is the Thomas Hardy Society, based on Dorchester, <https://www.hardysociety.org/>.

Song of Hope by Thomas Hardy, read by Dylan Pearse, Music by Irish Folk Group, Kern <https://www.youtube.com/watch?v=Q1qo8sWTi6M>

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