

Friday, 13 December 2019

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

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### Executive Summary (1 minute read)

**PKT Technologies Pty Ltd (formerly known as Fairlight.Au Pty Ltd) v Peter Vogel Instruments Pty Ltd** (FCAFC) - damages - contract - trade mark - copyright - appeal allowed in part - cross-appeal dismissed

**Goodman Fielder Pte Ltd v Conga Foods Pty Ltd** (FCA) - evidence - trade mark - 'hearsay rule' - 'business records exception' - respondents objected to affidavit which applicants sought to file - certain 'confidential annexures' and paragraphs of affidavit which relied on them were inadmissible

**Prodata Solutions Pty Ltd v South Australian Fire and Emergency Services Commission (No 2)** (FCA) - copyright - applicant sought division of issues in proceedings with result that trial proceed 'in three stages' - Court not satisfied that issues should be divided in manner proposed - Court proposed own division of issues - orders made

**Stafford v Automotive Distributors Limited** (FCA) - summary dismissal - trade mark - removal of trade mark from Trade Marks Register - applicant sought to appeal against summary judgment in respondent's favour - leave to appeal refused

**Hardingham v RP Data Pty Limited** (FCA) - copyright - separate determination of liability concerning certain works - applicants failed to establish infringement of copyright by respondent

## Summaries With Link (Five Minute Read)

### **PKT Technologies Pty Ltd (formerly known as Fairlight.Au Pty Ltd) v Peter Vogel Instruments Pty Ltd [2019] FCAFC 216**

Full Court of the Federal Court of Australia

Besanko, Banks-Smith & Stewart JJ

Damages - contract - trade mark - copyright - proceedings concerned quantification of damages for breach of "Development and Licensing Agreement", determination concerning liability and damages with respect to copyright infringement claim, and determination concerning damages for trade mark infringement - 'expectation damages' - 'reliance damages' - 'mitigation costs' - 'trade mark infringement' damages - 'account of profits' - *Copyright Act 1968* (Cth) - *Trade Marks Act 1955* (Cth) *Trade Marks Act 1995* (Cth) - held: appeal allowed in part - cross-appeal dismissed.

[PKT Technologies](#)

[From Benchmark Tuesday, 10 December 2019]

### **Goodman Fielder Pte Ltd v Conga Foods Pty Ltd [2019] FCA 2053**

Federal Court of Australia

Burley J

Evidence - trade mark - respondents objected to affidavit which applicants sought to file - respondents' objection made on basis that 'data relied upon' was hearsay evidence and that exception to 'hearsay rule' did not apply - respondents also contended Court should not admit evidence on basis that danger of unfair prejudice to respondents substantially outweighed evidence's probative value - whether exhibits on which affidavit relied were within 'business records exemption' - ss48(1)(d), 69(2), 69(3) & 135 *Evidence Act 1995* (Cth) - held: certain 'confidential annexures' and paragraphs which relied on them were not admissible.

[Goodman](#)

[From Benchmark Monday, 9 December 2019]

### **Prodata Solutions Pty Ltd v South Australian Fire and Emergency Services Commission (No 2) [2019] FCA 2051**

Federal Court of Australia

Charlesworth J

Copyright - applicant sought division of issues in proceedings with result that trial proceed 'in three stages' - whether Court satisfied that proposed 'trifurcation of issues' was 'necessary or appropriate' - r30.01 *Federal Court Rules 2011* (Cth) - *Reading Australia Pty Ltd v Australian Mutual Provident Society* [1999] FCA 718 - held: Court not satisfied to divide issues in manner proposed by applicant - Court proposed own motion concerning division of issues and made orders accordingly.

[Prodata](#)

[From Benchmark Monday, 9 December 2019]

# Benchmark

## **Stafford v Automotive Distributors Limited [2019] FCA 2068**

Federal Court of Australia

Banks-Smith J

Summary dismissal - trade mark - respondent sought removal of trade mark from Trade Marks Register - Registrar of Trade Marks found in respondent's favour - appellant appealed to Federal Circuit Court - respondent sought summary judgment in respect of appeal - primary judge granted summary judgment, finding appeal had no prospect of success - primary judge also struck out 'points of claim' and refused leave to replead - whether notice of appeal and appeal grounds complied with 36.01(2)(a) *Federal Court Rules 2011* (Cth) (Rules) - *Spencer v Commonwealth of Australia* [2010] HCA 28 - *Professional Administration Service Centres Pty Ltd v Federal Commissioner of Taxation* [2012] FCAFC 180 - *Trade Marks Act 1995* (Cth) - rr13.10(a) & 16.21(1) Rules - held: leave to appeal refused.

[Stafford](#)

[From Benchmark Tuesday, 10 December 2019]

## **Hardingham v RP Data Pty Limited [2019] FCA 2075**

Federal Court of Australia

Thawley J

Copyright - applicants claimed against respondent for infringement of copyright in respect of 'a large number of works' - Court made consent order for separate determination of liability concerning certain works - works were in relation to 'photographs and floor plans in respect of twenty properties' - 'licence of copyright' - sub-licence granted by cross-respondent to respondent - scope of licence which applicants granted to real estate agencies - whether applicants licensed real estate agencies to sub-license 'copyright works' to cross-respondent on terms authorising cross-respondent to grant a sub-licence - *Copyright Act 1968* (Cth) - held: applicants failed to establish infringement of copyright by respondent.

[Hardingham](#)

[From Benchmark Thursday, 12 December 2019]

# Benchmark

## The Jumbles

**By:** Edward Lear

They went to sea in a Sieve, they did,  
In a Sieve they went to sea:  
In spite of all their friends could say,  
On a winter's morn, on a stormy day,  
In a Sieve they went to sea!  
And when the Sieve turned round and round,  
And every one cried, 'You'll all be drowned!'  
They called aloud, 'Our Sieve ain't big,  
But we don't care a button! we don't care a fig!  
In a Sieve we'll go to sea!'  
Far and few, far and few,  
Are the lands where the Jumbles live;  
Their heads are green, and their hands are blue,  
And they went to sea in a Sieve.

II

They sailed away in a Sieve, they did,  
In a Sieve they sailed so fast,  
With only a beautiful pea-green veil  
Tied with a riband by way of a sail,  
To a small tobacco-pipe mast;  
And every one said, who saw them go,  
'O won't they be soon upset, you know!  
For the sky is dark, and the voyage is long,  
And happen what may, it's extremely wrong  
In a Sieve to sail so fast!'  
Far and few, far and few,  
Are the lands where the Jumbles live;  
Their heads are green, and their hands are blue,  
And they went to sea in a Sieve.

III

The water it soon came in, it did,  
The water it soon came in;  
So to keep them dry, they wrapped their feet



# Benchmark

In a pinky paper all folded neat,  
And they fastened it down with a pin.  
And they passed the night in a crockery-jar,  
And each of them said, 'How wise we are!  
Though the sky be dark, and the voyage be long,  
Yet we never can think we were rash or wrong,  
While round in our Sieve we spin!  
Far and few, far and few,  
Are the lands where the Jumblies live;  
Their heads are green, and their hands are blue,  
And they went to sea in a Sieve.

## IV

And all night long they sailed away;  
And when the sun went down,  
They whistled and warbled a moony song  
To the echoing sound of a coppery gong,  
In the shade of the mountains brown.  
'O Timballo! How happy we are,  
When we live in a sieve and a crockery-jar,  
And all night long in the moonlight pale,  
We sail away with a pea-green sail,  
In the shade of the mountains brown!  
Far and few, far and few,  
Are the lands where the Jumblies live;  
Their heads are green, and their hands are blue,  
And they went to sea in a Sieve.

## V

They sailed to the Western Sea, they did,  
To a land all covered with trees,  
And they bought an Owl, and a useful Cart,  
And a pound of Rice, and a Cranberry Tart,  
And a hive of silvery Bees.  
And they bought a Pig, and some green Jack-daws,  
And a lovely Monkey with lollipop paws,  
And forty bottles of Ring-Bo-Ree,  
And no end of Stilton Cheese.

# Benchmark

Far and few, far and few,  
Are the lands where the Jumbles live;  
Their heads are green, and their hands are blue,  
And they went to sea in a Sieve.

VI

And in twenty years they all came back,  
In twenty years or more,  
And every one said, 'How tall they've grown!'  
For they've been to the Lakes, and the Terrible Zone,  
And the hills of the Chankly Bore;  
And they drank their health, and gave them a feast  
Of dumplings made of beautiful yeast;  
And everyone said, 'If we only live,  
We too will go to sea in a Sieve,—  
To the hills of the Chankly Bore!'  
Far and few, far and few,  
Are the lands where the Jumbles live;  
Their heads are green, and their hands are blue,  
And they went to sea in a Sieve.

[https://en.wikipedia.org/wiki/Edward\\_Lear](https://en.wikipedia.org/wiki/Edward_Lear)

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