



Friday, 30 August 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)

Rakman International Pty Limited v Boss Fire & Safety Pty Ltd (No 3) (FCA) - cross-claim for invalidity of patents had succeeded, and, but for this, infringement claim would have succeeded - successful respondent awarded costs with a discount of 20%

Farrell v Super Retail Group Limited (Confidentiality Applications) (FCA) - Court largely rejected a wide application for suppression orders

HABEAS CANEM

McGregor the puppy



Summaries With Link (Five Minute Read)

Rakman International Pty Limited v Boss Fire & Safety Pty Ltd (No 3) [2024] FCA 914

Federal Court of Australia

Yates J

Costs in patent cases - Rakman International and Trafalgar Group sued Boss Fire & Safety and its sole director for patent infringement - the respondents denied infringement and cross-claimed seeking revocation of all the claims of the patent - the Court found all the claims of the patent invalid on the ground of lack of novelty in respect of four claims and lack on an inventive step in respect of a fifth claim - the Court held that, had the claims not been invalid, the infringement case would have succeeded against Boss, but not against its director - the Court made a costs order based on an unreasonable failure to accept an offer of compromise - the Full Court set aside the costs order, holding the offer was not a genuine offer in circumstances where only the discontinuance of proceedings was offered, and that it might also be appropriate to apply a discount to take account of costs the applicants incurred in respect of issues which were either abandoned or not pressed by Boss - the Full Court remitted the costs question to the primary judge - held: the parties now agreed that global costs including both the claim and cross-claim should be made, but differed as to whether a discount should be applied - the order of the Full Court required this in any event - the infringement case was a very small part of the overall proceeding and turned on limited questions of claim construction - although the Court had rejected Boss's contentions on construction, they were not unarguable, and were supported by expert evidence - the Court was not persuaded that any discount was warranted in respect of Boss's defence of the infringement case insofar as it turned on questions of claim construction - the Court was not persuaded that a discount was warranted because of Boss's abandonment of, or lack of success on, issues that were part of its lack of novelty case - however, a discount was warranted in respect of Boss's abandonment of its case in respect of the disclosures of certain materials - mathematical precision was not possible - a discount of 20% should be made to the costs awarded to Boss, based on the Court's experience in the trial, and its task of analysing the evidence and determining the legal questions that were raised.

[Rakman International Pty Limited](#)

[From Benchmark Friday, 30 August 2024]

Farrell v Super Retail Group Limited (Confidentiality Applications) [2024] FCA 954

Federal Court of Australia

Lee J

Confidential information - a dispute arose between two senior employees of SRG and that company - one of the employees commenced proceedings, claiming that a binding settlement of the dispute had been reached - the Court now determined an application for a suppression order by SRG - held: the Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice which is a statutory obligation pursuant to s37AE of the *Federal Court of Australia Act 1976* (Cth) - a confidentiality or suppression order is not justified simply because it may be "convenient, reasonable or

sensible", and nor is it sufficient that a confidentiality order may be viewed as serving "some notion of public interest" - parties and witnesses must accept the embarrassment, damage to reputation and the possible consequential loss which can be inherent in litigation - assessing whether to make an order does not involve some form of balancing exercise weighing up, on the one hand, the interests of open justice and, on the other hand, the prejudice which may occur if information is released - the necessity of an order for a relevant purpose must be demonstrated - whether a suppression order is necessary has to be judged by reference to all the circumstances, including what relevant information is already in the public domain - the best point for SRG was that it fell between two stools: if the case has settled as alleged by the employee, it would have been entitled to enforce a confidentiality term; if it has not, then settlement discussions would not have been revealed - however, this was just the inevitable and sometimes potentially embarrassing by-product of a specific performance suit over an alleged settlement agreement, being a type of litigation which, perforce, allows for the adduction into evidence of material that would, but for the nature of the suit, been subject to settlement privilege - the better course was for final confidentiality orders to be made for a limited time, but on an entirely different basis than had been by SRG.

[Farrell](#)

[From Benchmark Friday, 30 August 2024]

Benchmark

INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Manchester Ship Canal Co v United Utilities Water Ltd (UKSC) - Manchester Ship Canal company was not barred from bringing a common law damages claim for trespass and nuisance against a public utilities company that discharged raw, untreated and foul sewage into the canal from outfalls lawfully maintained by the sewerage authority

Summaries With Link (Five Minute Read)

Manchester Ship Canal Co v United Utilities Water Ltd [2024] UKSC 22

Supreme Court of the United Kingdom

Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Burrows, Lord Stephens, Lady Rose, Lord Richards

In a declaratory ruling, the Supreme Court was asked to decide whether the Manchester Ship Canal Company could bring a claim against the statutory sewerage authority for discharges of foul sewage into the canal. The defendant, United Utilities, was the statutory sewerage authority for North West England and owned about 100 outfalls from which treated sewage was discharged into the canal. However, sometimes untreated sewage was discharged into the canal as well. No allegation was made that the discharge of untreated sewage was caused by negligence. However, it could have been avoided through improved infrastructure. The High Court, upheld by the Court of Appeal, found that a canal owner could not bring a claim based on nuisance or trespass against a sewerage operator unless the discharge was the result of negligence or deliberate wrongdoing. The Supreme Court unanimously allowed the Canal Company's appeal. Sewerage is regulated by the *Water Industry Act 1991* and the Supreme Court held that nothing in the legislation permitted or authorised a sewerage authority to discharge foul water through outfalls. Inasmuch as the statute did not authorise the activity, common law remedies were available. The Court rejected the defence that the only way to avoid fouling the canal would be to construct sewerage infrastructure and that was a matter for Parliament. The Court found that there was nothing in the legislation indicating that Parliament intended to extinguish common law rights of action. While an injunction against further discharge presented questions relating to the process of regulatory approval for capital expenditures by the sewerage authority, that did not mean that common law-based awards for damages for invasion of property rights were precluded.

[Manchester Ship Canal Co](#)

Poem for Friday

i carry your heart with me

by e.e. cummings (1894-1962)

i carry your heart with me (i carry it in
my heart) i am never without it (anywhere
i go you go, my dear; and whatever is done
by only me is your doing, my darling)

i fear

no fate (for you are my fate, my sweet) i want
no world (for beautiful you are my world, my true)
and it's you are whatever a moon has always meant
and whatever a sun will always sing is you

here is the deepest secret nobody knows
(here is the root of the root and the bud of the bud
and the sky of the sky of a tree called life; which grows
higher than soul can hope or mind can hide)
and this is the wonder that's keeping the stars apart

i carry your heart (i carry it in my heart)

Edward Estlin Cummings (e.e. cummings), an American poet, essayist and playwright was born on 14 October 1894 in Cambridge Massachusetts. His parents encouraged his creativity, and included in their circle of friends artists, philosophers and writers. Cummings's father was a professor at Harvard, and later a minister of the Unitarian church. Cummings wrote poetry from the age of 8. Cummings was an ambulance driver during the first world war. He was interned in a camp in Normandy in the first world war, for having expressed anti-war sentiments. During his life he wrote about 2900 poems. He returned to Paris many times throughout his life. It has been written of Cummings that "No one else has ever made avant-garde, experimental poems so attractive to the general and the special reader," and "Cummings is a daringly original poet, with more vitality and more sheer, uncompromising talent than any other living American writer."

Read by **Colin McPhillamy**, actor and playwright. Colin was born in London to Australian parents. He trained at the Royal Central School of Speech and Drama in London. In the



UK he worked in the West End, at the Royal National Theatre for five seasons, and extensively in British regional theatre. In the USA he has appeared on Broadway, Off-Broadway and at regional centres across the country. Colin has acted in Australia, China, New Zealand, and across Europe. Colin is married to Alan Conolly's cousin Patricia Conolly, the renowned actor and stage actress: https://en.wikipedia.org/wiki/Patricia_Conolly and <https://trove.nla.gov.au/newspaper/article/47250992>.

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