Supreme Court
New South Wales

Medium Neutral Citation:	**Steepe v The Commonwealth of Australia [2021] NSWSC 368**
Hearing dates:	22 March 2021
Date of orders:	15 April 2021
Decision date:	15 April 2021
Jurisdiction:	Common Law
Before:	Davies J
Decision:	(1) Dismiss the plaintiff's notice of motion for default judgment filed 9 December 2020. (2) Dismiss the plaintiff's notice of motion filed 28 January 2021. (3) Order that the proceedings be dismissed pursuant to r 13.4 of the Uniform Civil Procedure Rules 2005 (NSW). (4) Order that the plaintiff pay the defendant's costs of the plaintiff's notice of motion filed 28 January 2021, the defendant's notice of motion filed 23 December 2020, and of the proceedings.
Catchwords:	CIVIL PROCEDURE - default judgment - default in filing defence - where defence filed after time limited by the *Uniform Civil Procedure Rules* but before notice of motion for default judgment filed - defendant not in default CIVIL PROCEDURE - summary disposal - where plaintiff seeks to strike out defendant's motion for summary dismissal of proceedings - where no basis in the *Uniform Civil Procedure Rules* or otherwise for plaintiff's application CIVIL PROCEDURE - summary disposal - dismissal of proceedings - no reasonable cause of action disclosed - plaintiff seeking to stop RAAF flights over her property - numerous causes of action asserted - whether plaintiff has a legal right and is entitled to an interlocutory injunction -

where no legal right to prevent aircraft flying over plaintiff's property - where even if plaintiff had rights s 72 *Civil Liability Act* is a complete answer to trespass or nuisance actions - where no contract between plaintiff and RAAF - where facts not capable of demonstrating negligence - where no cause of action based on alleged breach of *Biosecurity Act* - where no arguable claim for breach of privacy - where harassment is no basis for a claim for damages - plaintiff demonstrates no right to prevent RAAF aircraft flying over land - no case for interlocutory injunction - proceedings dismissed pursuant to r 13.4

TORTS - trespass and nuisance - rights of landowner - maxim *cuius est solum ejus est utque ad coelum* - whether airspace owned to the heavens - whether aircraft flying over plaintiff's land constituted a trespass or nuisance

CONTRACTS - formation - consideration - intention to create legal relations - where plaintiff landowner unilaterally required payment for alleged trespass on land - alleged acquiescence by trespasser - where alleged trespasser had statutory right to use airspace above plaintiff's land - where no consideration provided by plaintiff - whether contract came into existence

Legislation Cited:

Air Services Act 1995 (Cth) s 3
Air Navigation Act 1920 (Cth)
Airspace Act 2007 (Cth) ss 8, 11
Airspace Regulations 2007 (Cth) cl 6
Biosecurity Act 2015 (NSW) ss 6, 10, 25
Biosecurity Regulation 2017 (NSW) cl 44C
Civil Aviation Act 1988 (Cth)
Civil Liability Act 2002 (NSW) s 72
Civil Procedure Act 2005 (NSW) s 3
Constitution Act 1902 (NSW) s 5
Federal Court of Australia Act 1976 (Cth) s 31A
Judiciary Act 1903 (Cth) s 78B
The Constitution (Cth) ss 106, 107, 108 ,109
Uniform Civil Procedure Rules 2005 (NSW) rr 6.1, 6.2, 12.11, 13.1, 13.4, 14.3, 14.28, 15.1, 15.5, 16.2

Cases Cited:

Agar v Hyde (2000) 201 CLR 552; [2000] HCA 41
Australian Broadcasting Corporation v Lenah Game Meats Pty Limited (2001) 208 CLR 199; [2001] HCA 63
Australian Woollen Mills Pty Ltd v The Commonwealth (1954) 92 CLR 424
Bendal Pty Ltd v Mirvac Project Pty Ltd (1991) 23 NSWLR 464

Bernstein of Leigh (Baron) v Skyviews & General Ltd [1978] QB 479
Commissioner for Railways v Valuer-General [1974] AC 328
Commonwealth of Australia v The State of New South Wales (1923) 33 CLR 1
Discount and Finance Ltd v Gehrig's NSW Wines Ltd (1940) 40 SR (NSW) 598
Fancourt v Mercantile Credits Ltd (1983) 154 CLR 87
Gee v Burger [2009] NSWSC 149
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125
Janney v Steller Works Pty Limited [2017] VSC 363
Kalaba v Commonwealth of Australia [2004] FCA 763
LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd (1989) 24 NSWLR 490
New South Wales v The Commonwealth of Australia (2006) 229 CLR 1; [2006] HCA 52
Paul Ernest Simmons v Protective Commissioner of NSW also known as NSW Trustee and Guardian [2012] NSWSC 455
Placer Developments Limited v The Commonwealth of Australia (1969) 121 CLR 353
Plenty v Dillon (1991) 171 CLR 635; [1991] HCA 5
Ramsden v Dyson (1866) LR 1HL 129
Re Finlayson; Ex parte Finlayson (1997) 72 ALJR 73
Shaw v State of New South Wales [2012] NSWCA 102
Spencer v The Commonwealth (2010) 241 CLR 118; [2010] HCA 28

Texts Cited:

Fleming's The Law of Torts, 9th Ed., 1998, LBC Information Services, Australia
Meagher, Gummow and Lehane's Equity Doctrines and Remedies, 5th Ed., 2015, LexisNexis Butterworths, Australia

Category:

Procedural rulings

Parties:

Julie Steepe (Plaintiff)
The Commonwealth of Australia (Defendant)

Representation:

Counsel:
In person (Plaintiff)
A Mitchelmore SC (Defendant)
Solicitors:
Self-represented (Plaintiff)
Australian Government Solicitor (Defendant)

File Number(s):

2020/294011

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Nil

JUDGMENT

1 The plaintiff purchased a property of about 40 hectares on the Pacific Highway in Bulahdelah on 5 March 2013. The property is situated a little to the north east of the Williamtown airbase which is operated by the Royal Australian Air Force (RAAF). Aeroplanes from that airbase, including planes involved in training exercises, frequently fly over the plaintiff's land. The plaintiff claims that her right to quiet enjoyment is interfered with, and there is injury to the business of sheep farming that she conducts on that property. The plaintiff claims that, prior to her contacting the RAAF on 15 June 2020, there were approximately five or fewer flights over her property per week. She claims that after 15 June the RAAF increased their flights to about 500 flights per week.

2 The plaintiff, acting for herself, commenced proceedings by filing a statement of claim on 13 October 2020. The defendant was named as the "Department of Defence trading as Royal Australian Air Force (RAAF)". The plaintiff claimed $15,365,160.

3 What was set out under the heading "Pleading and Particulars" was a series of statements saying that the plaintiff had sent to the RAAF a "cease and desist" notice requiring all planes to stop entering her property, stating that they were trespassing and that she did not consent to that trespass. The pleading continued that a second "cease and desist" notice and then a final "cease and desist" notice were sent. Subsequently, the plaintiff issued a series of invoices to the RAAF totalling $15,365,160, purporting to charge them, apparently on the basis of the number of planes that flew over her property.

4 On 9 December 2020 the plaintiff filed a notice of motion for default judgment for a liquidated claim. The amount of the claim was what had been claimed in the statement of claim.

5 On 23 December 2020 the defendant, calling itself "The Commonwealth of Australia (as represented by the Department of Defence)" filed and served a motion pursuant to r 13.4(1) of the *Uniform Civil Procedure Rules 2005* (NSW) seeking that the proceedings be dismissed, alternatively, an order pursuant to r 14.28(1) UCPR that the whole of the statement of claim be struck out.

6 On 15 January 2021 the Commonwealth filed a defence to the statement of claim.

7 On 28 January 2021 the plaintiff filed a further notice of motion seeking an order pursuant to r 14.3(1) UCPR that the whole of the defence filed by the defendant on 15 January 2021 be struck out, an order pursuant to r 12.11(2) UCPR that the whole of the defendant's notice of motion filed 23 December 2021 be struck out, that in the alternative to those orders, the plaintiff be granted leave to file an amended statement of claim, and an order in the form of an interlocutory injunction that the RAAF stop entering the plaintiff's property at Bulahdelah.

8 On 16 February 2021, pursuant, it would appear, to consent orders made by the Registrar on 10 February 2021, the plaintiff filed an amended statement of claim.

9 The amended statement of claim is divided into sections with the following headings:

- Right to quiet enjoyment
- Trespass
- Privacy
- Biosecurity
- Training area
- The contract
- Breach of contract
- Gross negligence

10 The amended statement of claim then said:

> And the Plaintiff Claims against the Defendant:
>
> 1. The causes of action of trespass, private nuisance and breach of contract.
>
> 2. The Plaintiff seeks an Order for aggravated damages for the continued deliberate and wilful harassment and gross negligence.
>
> 3. The Plaintiff seek Orders that the Defendant has acquiesced to the Plaintiff's Terms and Schedule of Fees on 30 July 2020 and therefore any invoices associated with the Defendant's flights through the Plaintiffs property are valid and payable.
>
> 4. The Defendant pay the Plaintiff's invoices.
>
> 5. The Plaintiff seeks an Interim Order that the Defendant and their aircraft be stopped from entering the Plaintiff's property known as 9150 Pacific Highway Bulahdelah until final orders are handed down.
>
> 6. The Plaintiff seeks Final Orders that the Defendant and their aircraft be stopped from entering the Plaintiff's property known as 9150 Pacific Highway Bulahdelah.
>
> 7. Costs
>
> 8. Such further or other relief as the Court shall deem proper.

11 This judgment deals with the two notices of motion filed by the plaintiff, and the defendant's notice of motion.

Default judgment

12 The plaintiff claims to be entitled to default judgment on the basis that a defence was not filed until 15 January 2021.

13 Part 16 UCPR deals with default judgment. Rule 16.2 provides:

> **16.2 Definition of "in default" (cf SCR Part 17, rule 2; DCR Part 13, rule 1; LCR Part 11, rule 1)**
>
> (1) A defendant is in default for the purposes of this Part -
>
> (a) if the defendant fails to file a defence within the time limited by rule 14.3(1) or within such further time as the court allows, or
>
> (b) if the defendant fails to file any affidavit verifying his or her defence in accordance with any requirement of these rules, or
>
> (c) if, the defendant having duly filed a defence, the court orders the defence to be struck out.
>
> (2) Despite subrule (1), a defendant is not in default if the defendant -
>
> (a) has made a payment towards a liquidated claim under rule 6.17, or

> (b) has filed an acknowledgment of claim under rule 20.34, or
>
> (c) has filed a defence after the time limited by these rules or allowed by the court, but before a default judgment is given against the defendant.

14 Although the defendant was initially in default under r 16.2, when a defence was filed on 15 January 2021 default judgment had not been given. Accordingly, under sub-r (2(c) the defendant was not in default from that time.

15 The plaintiff is not entitled to default judgment.

Motion to strike out the defence

16 The plaintiff seeks an order pursuant to r 14.3(1) UCPR that the defendant's defence be struck out. Rule 14.3 provides:

> **14.3 Defence (cf SCR Part 15, rule 3; DCR Part 10, rule 1; LCR Part 9, rule 1)**
>
> (1) Subject to these rules, the time limited for a defendant to file a defence is 28 days after service on the defendant of the statement of claim or such other time as the court directs for the filing of a defence.
>
> (2) If, before the defendant files a defence, a notice of motion for summary judgment under rule 13.1 is served on the defendant, but the court does not on that motion dispose of all of the claims for relief against the defendant, the court may fix a time within which the defendant must file a defence.
>
> **Note -**
>
> See rule 9.11(2) under which a defence to a cross-claim for contribution under section 5 of the *Law Reform (Miscellaneous Provisions) Act 1946* may not be filed unless the court so directs.

17 Although, as I have said, the defence was not filed within 28 days as r 14.3(1) requires, a defence was subsequently filed prior to the filing of the plaintiff's notice of motion on 28 January 2021. That defence pleads substantive defences to the plaintiff's claim as it was pleaded in the original statement of claim. The defence, in substance, is that there is no contract between the plaintiff and the defendant. The only basis on which a judgment was claimed in the original statement of claim was for a failure to pay the invoices which, in substance, resulted from a contract between the plaintiff and the RAAF.

18 Rule 14.3 does not give any power to strike out a defence which is not filed within the time specified. The power to do so would need to be found elsewhere. For reasons already given, the defendant is not in default for the purposes of Part 16 of the UCPR. Part 12, to the extent it is relevant, deals only with dismissal of proceedings, not defences.

19 The only other power in the UCPR is to be found in rr 13.1 and 14.28. In order for the defence to be struck out, the plaintiff would need to demonstrate under either of those rules that the defence disclosed no reasonable defence, had a tendency to cause prejudice, embarrassment or delay, was an abuse of process, or that a basis for giving summary judgment had been met. None of those matters is made out. A party would not ordinarily be deprived of the right to rely on a defence simply because it was not filed within the 28 day period required by r 14.3.

20 The plaintiff's application to strike out the defence is refused.

Motion to strike out defendant's motion

21 The plaintiff seeks also that the notice of motion filed by the defendant seeking summary dismissal be struck out by reason of r 12.11(2).

22 Rule 12.11 provides:

> **12.11 Setting aside originating process etc (cf SCR Part 11, rule 8)**
>
> (1) In any proceedings, the court may make any of the following orders on the application of a defendant -
>
> (a) an order setting aside the originating process,
>
> (b) an order setting aside the service of the originating process on the defendant,
>
> (c) an order declaring that the originating process has not been duly served on the defendant,
>
> (d) an order discharging -
>
> (i) any order giving leave to serve the originating process outside New South Wales, or
>
> (ii) any order confirming service of the originating process outside New South Wales,
>
> (e) an order discharging any order extending the validity for service of the originating process,
>
> (f) an order protecting or releasing -
>
> (i) property seized, or threatened with seizure, in the proceedings, or
>
> (ii) property subject to an order restraining its disposal or in relation to which such an order is sought,
>
> (g) an order declaring that the court has no jurisdiction over the defendant in respect of the subject-matter of the proceedings,
>
> (h) an order declining to exercise jurisdiction in the proceedings,
>
> (i) an order granting such other relief as the court thinks appropriate.
>
> (2) Such an order may not be made unless notice of motion to apply for the order is filed by the defendant within the time limited for the defendant to enter an appearance in the proceedings.
>
> (3) Notice of motion under subrule (2) -
>
> (a) may be filed without entering an appearance, and
>
> (b) must bear a note stating the applicant's address for service.
>
> (4) The making of an application for an order under subrule (1) does not constitute submission to the jurisdiction of the court.

23 The basis for the plaintiff's claim to strike out the defendant's notice of motion is that the notice of motion was not filed within the time limited for the defendant to enter an appearance in the proceedings.

24 The defendant's notice of motion filed 23 December 2020 is not within the purview of r 12.11. It is a motion seeking summary dismissal under r 13.4. Rule 12.11 is concerned with setting aside originating process where service may not have properly been effected, or where there is some challenge to the jurisdiction of the Court. In any event, a notice of motion is not originating process: s 3 *Civil Procedure Act 2005* (NSW); rr.6.1 and 6.2 UCPR.

25 The Rules do not provide any time limitation in respect of which a notice of motion under r 13.4 may be filed.

26 The plaintiff's application to strike out the defendant's motion is misconceived. The application is refused.

The defendant's motion

The plaintiff's application for an interlocutory injunction

27 These two matters can properly be dealt with together because the interlocutory injunction the plaintiff seeks is, in essence, an injunction in aid of a legal right. If the plaintiff is found to have a legal right, she may be entitled to an interlocutory injunction, and the defendant would be unlikely to be successful on its application for summary dismissal. If the plaintiff has no legal right, she will fail on her application for an injunction, and the defendant is likely to be entitled to an order summarily dismissing the proceedings.

28 In general terms, to obtain an interlocutory or a final injunction of this type, a plaintiff would have to prove that they possessed some legal right, that the right was of a proprietary nature, that the right was either threatened or had been infringed and that the infringement was likely to be continued or repeated, and that damages would not be sufficient recompense to the plaintiff for the infraction of her legal right: *Meagher, Gummow and Lehane's Equity Doctrines and Remedies,* 5th Ed., 2015, LexisNexis Butterworths, Australia at para 21-035; *Australian Broadcasting Corporation v Lenah Game Meats Pty Limited* (2001) 208 CLR 199; [2001] HCA 63 at [8]-[11].

29 The principles to be applied on an application for summary dismissal are similar to those applied on summary judgment applications, and are well known. It would have to be found that the claim is so obviously untenable that it cannot possibly succeed or is manifestly groundless, or is one which the Court is satisfied cannot succeed, or is an abuse of process: *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129; see also *Shaw v State of New South Wales* [2012] NSWCA 102 at [30]-[33]. The assessment is made taking the plaintiff's case at its highest.

30 In *Agar v Hyde* (2000) 201 CLR 552; [2000] HCA 41, the plurality said at [57]:

> Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways [citing *Dey v Victorian Railway Commissioner* (1949) 78 CLR 62 at 91, and *General Steel Industries]*, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way.

31 In *Spencer v The Commonwealth* (2010) 241 CLR 118; [2010] HCA 28, a case concerned with s 31A of the *Federal Court of Australia Act 1976* (Cth), French CJ and Gummow J quoted with approval what the High Court had earlier said in *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at 99:

> The power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried.

32

In *Paul Ernest Simmons v Protective Commissioner of NSW also known as NSW Trustee and Guardian* [2012] NSWSC 455, Hammerschlag J said at [62]:

> Whilst UCPR Pt 13 r 13.4 does not expressly provide (as does s 31A of the Federal Court of Australia Act 1976 (Cth)) that a proceeding need not be hopeless or bound to fail to have no reasonable prospects of success, the combination of the inclusion of the word reasonable and the operation of s 56(2) sufficiently clearly indicates, in my view, that the approach to exercising the power to dismiss under the rule is the same as that elucidated by the High Court in relation to the federal enactment.

33 The provisions of the *Civil Procedure Act* do not warrant any result different from that indicated by the *General Steel* test: *Shaw* at [134].

34 Although the plaintiff identifies her causes of action to be trespass, private nuisance and breach of contract, she also claims damages for harassment and gross negligence. In addition, she pleads matters related to privacy and biosecurity. Given that the plaintiff is self-represented, I consider it appropriate to regard all of these matters as a basis she is putting forward for her interlocutory injunction, and ultimately for her final relief.

35 Considerable weight was placed by the plaintiff on the judgment of Isaacs J in *The Commonwealth of Australia v The State of New South Wales* (1923) 33 CLR 1, to support her submission that she has a right to prevent the aircraft flying over her property. She relied in particular on these two passages:

> A fee simple is the most extensive in quantum, and the most absolute in respect to the rights which it confers, of all estates know to the law. It confers, and since the beginning of legal history it always has conferred, the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination, including the right to commit unlimited waste…. Besides these rights of ownership, a fee simple at the present day confers an absolute right, both of alienation *inter vivos* and of devise by will. (p. 42)
>
> …"property" – that being even a more general term than "land" – it is the proper construction that the full contents of the parcel of land pass; the "land", being measured superficially by metes and bounds and extending actually downward indefinitely and notionally upward indefinitely, … (p.45)

36 The plaintiff submitted from those passages that the airspace above her land is part of her land.

37 A few things should be said about that case. First, it was concerned with whether lands which vested in the Commonwealth in fee simple were freed and discharged from all reservations, rights, royalties, conditions and obligations of any kind whatsoever to the State of New South Wales. Those matters related to minerals in or under the land, and did not at all concern rights in relation to airspace. Secondly, the remark of Isaacs J about land extending "notionally upward indefinitely", although derived from the earlier common law (but see below), was entirely obiter. Thirdly, the case was heard by five judges, and only Isaacs J made any mention of the notion of what "land" extended to.

38 The notion that lands extends indefinitely upwards and downwards, derives from a Latin maxim, *cuius est solum ejus est utque ad coelum et ad inferos*, which may be translated, whose is the ground (or soil) his is also to heaven and the lower world. In *Fleming's The Law of Torts*, 9th Ed., 1998, LBC Information Services, Australia, the learned author said (at p 51):

> Much play has been made of the maxim "cuius est solum ejus est utque ad coelum" (he who owns the surface owns up to the sky), but this "fanciful phrase" (*Wandsworth Board of Works v United Telephone Co* (1884) 13 QBD 904 at 915) of dubious ancestry

> has never been accepted in its literal meaning of conferring unlimited rights into the infinity of space over land. The cases in which it has been invoked establish no wider proposition than that the air above the surface is subject to dominion in so far as the use of space is necessary for the proper enjoyment of the surface.

39 In *Commissioner for Railways v Valuer-General* [1974] AC 328 Lord Wilberforce said of the maxim (at 351):

> There are a number of examples of its use in judgements of the 19th century, by which time mineral values had drawn attention to downwards extent as well as, or more than, extent upwards. But its use, whether with reference to mineral rights, or trespass in the air space by projections, animals or wires, is imprecise and it is mainly serviceable as dispensing with analysis: cf. *Pickering v Rudd* (1815) 4 Camp. 219 and *Ellis v Loftus Iron Co* (1874) L.R. 10 C. P. 10. In none of these cases is there an authoritative pronouncement that 'land' means the whole of the space from the centre of the earth to the heavens: so sweeping, unscientific and unpractical (sic) a doctrine is unlikely to appeal to the common mind.

40 In *Bernstein of Leigh (Baron) v Skyviews & General Ltd* [1978] QB 479 at 488 Griffiths J held that the rights of an owner to exclusive possession are restricted to "such height as is necessary for the ordinary use and enjoyment of the land and the structures upon it", and "above that height he has no greater rights in the airspace than any other member of the public". His Lordship went on to find in accordance with that test that an aircraft did not infringe any rights of the landowner by flying over his land.

41 In approving that decision, Hodgson J said in *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1989) 24 NSWLR 490 at 495:

> If the defendant's submission is to the effect that entry into airspace is a trespass only if it occurs at a height and in a manner which actually interferes with the occupier's actual use of land at the time, then I think it is incorrect. In my view, the rule stated in *Bernstein of Leigh (Baron) v Skyviews & General Ltd* by Griffiths J was rather that a trespass occurred only if the incursion was at a height which may interfere with the ordinary user of land, or is into airspace which is necessary for the ordinary use and enjoyment of the land and structures upon it; see (at 486, 488). It was held in that case that there was no trespass by an aeroplane flying many hundreds of feet above the land. On the other hand, in *Woollerton and Wilson Ltd v Richard Costain Ltd* and *Graham v KD Morris and Sons Pty Ltd*, the incursions of crane jibs at heights of the order of 50 feet above the plaintiff's roof were treated as trespasses.

42 What Hodgson J said in *LJP Investments* was followed by Bryson J in *Bendal Pty Ltd v Mirvac Project Pty Ltd* (1991) 23 NSWLR 464, another case concerning a tower crane overhanging property. Bryson J also said (at 470):

> At some point for which no precise definition is available, activities above the surface of land cease to have sufficiently close relationship with it to be protected by the law of trespass, the modern example being furnished by the decision of Griffiths J in *Bernstein of Leigh (Baron) v Skyviews & General Ltd* [1978] 1 QB 478 relating to overflying aircraft.

43 The plaintiff also relied on the decision of Riordan J in *Janney v Steller Works Pty Limited* [2017] VSC 363. That case was, however, like *LJP Investments*, not a case about aircraft but about an overhanging crane. An interlocutory injunction was granted on the basis that the defendant had deliberately violated the plaintiff's rights. Riordan J made oblique reference to *Bernstein*, saying only that whether a claim in trespass can prevent aircraft flying over property awaits a definitive ruling from the High Court.

44 The position at common law is, therefore, that a landowner does not have any right arising from ownership of the land to prevent aircraft flying over their property, provided that it is at a height above that which is necessary for the ordinary use and enjoyment of the land and the structures upon it.

45 The plaintiff submitted that she has a right to "quiet enjoyment of the land", and that is interfered with by the noise of the aircraft. Any notion of quiet enjoyment is a matter between a landlord and a tenant, either as an implied or express condition of a lease. The word "quiet" in those circumstances is not concerned with noise as such, but with a right to reside on the land without interruption, interference or disturbance by the landlord or grantor of the land. The only appropriate analogy for an owner of land in fee simple is that no other person has a right to trespass upon the land or, arguably, commit a nuisance on or onto the land. As will be seen below, matters of trespass and nuisance as far as aircraft are concerned, have been dealt with by statute. The plaintiff has no other 'right' of quiet enjoyment.

46 In any event, there is a statutory basis authorising the flights about which the plaintiff complains. Section 11(1) of the *Airspace Act 2007* (Cth) provides:

> (1) The regulations may make provision for and in relation to conferring functions and powers on CASA that are in connection with the administration and regulation of Australian-administered airspace.

47 CASA is the Civil Aviation Safety Authority established by the *Civil Aviation Act 1988* (Cth). "Australian-administered airspace" is defined as having the meaning given in paragraphs (a) and (b) of the definition of Australian-administered airspace in sub-s 3(1) of the *Air Services Act 1995* (Cth). That definition is as follows:

> **Australian-administered airspace** means:
>
> (a) the airspace over Australian territory; and
>
> (b) airspace that has been allocated to Australia by ICAO under the Chicago Convention and for which Australia has accepted responsibility;

48 Clause 6 of the *Airspace Regulations 2007* (Cth) empowers CASA to declare an area of Australian territory a "restricted area" where, in the opinion of CASA, it is necessary to restrict the flight of aircraft over the area to aircraft flown in accordance with specified conditions in the interests of, inter alia, public safety and security. The current declaration in force, which locates the plaintiff's property in an area which has been declared a restricted area, was made by CASA's delegate on 30 October 2020, and amended on 16 December 2020. Equivalent declarations have been made in respect of the airspace over the plaintiff's property going back to at least 2007.

49 The relevant declaration for the times about which the plaintiff complains of flights, was Office of Airspace Regulation (OAR) 029/20 made on 18 May 2020 and commenced on 21 May 2020. It relevantly listed two restricted areas which include the airspace above the plaintiff's property, declared for "military flying". Under cl 5 of the OAR, aircraft may only be flown in the restricted areas with the approval of the relevant controlling authority. That controlling authority was "FLTCDR453SQN Williamtown", a role filled by Squadron Leader Kyle Gregory. Squadron Leader Gregory has sworn an affidavit saying that in his capacity as the controlling authority, he approves flights in those restricted areas.

50 This evidence demonstrates that the flights which pass over the plaintiff's property are duly authorised under the *Airspace Act* and the *Airspace Regulations*.

51 For these reasons, the plaintiff has no legal right which enables her to prevent aircraft flying over her property, nor any legal right to damages for such an occurrence. Whilst that is sufficient to determine the plaintiff's notice of motion and the defendant's notice of motion against the plaintiff, I will consider the particular causes of action and the other matters she raises in her amended statement of claim.

Trespass and nuisance

52 Section 72 of the *Civil Liability Act 2002* (NSW) (CLA) provides:

> **72 Trespass or nuisance by aircraft (cf former s 2(1) and (5) of *Damage by Aircraft Act 1952*)**
>
> (1) No action lies in respect of trespass or nuisance by reason only of the flight (or the ordinary incidents of the flight) of an aircraft over any property at a height above the ground that is reasonable (having regard to wind, weather and all the circumstances of the case) so long as the Air Navigation Regulations are complied with.
>
> (2) In this section, Air Navigation Regulations means the regulations made under the *Air Navigation Act 1920* of the Commonwealth and includes such of the provisions of those regulations as are applicable to and in respect of air navigation within New South Wales by virtue only of the *Air Navigation Act 1938*.

53 None of the Air Navigation Regulations in force applies to the aircraft operated by the RAAF, which are "state aircraft" under the *Air Navigation Act 1920* (Cth) and the *Civil Aviation Act 1988* (Cth).

54 The plaintiff's submission that s 72 of the CLA is invalid, said variously to be because the parliament of New South Wales had no power to enact it and because the provision was inconsistent with the Commonwealth Constitution, has no basis.

55 In this regard, and for other reasons, the plaintiff relied on the failure of a referendum to amend the Commonwealth Constitution in 1937 to give the Commonwealth power to legislate about air navigation and aircraft. That referendum was unsuccessful. The plaintiff argued, therefore, that neither the Federal government nor the State government had the power to legislate in relation to aircraft, because the people of the Commonwealth had refused to give them that power. The plaintiff submitted that the parliaments of the States only derive their power from ss 106 to 109 of the Constitution.

56 Given the submissions made by the plaintiff concerning the Commonwealth Constitution, the defendant quite properly raised with me the issue of whether the matter should be adjourned so that notices under s 78B of the *Judiciary Act 1903* (Cth) could be given to the relevant Attorneys-General. The defendant submitted, however, that such a course should not be followed because the plaintiff had not sought to characterise the matter as one arising under the Constitution nor one involving its interpretation.

57 In my opinion, the defendant's submission in that regard should be accepted. In *Re Finlayson; Ex parte Finlayson* (1997) 72 ALJR 73 Toohey J said (at 74):

> In terms of s 78B, a cause does not "involve" a matter arising under the Constitution or involving its interpretation merely because someone asserts that it does. That is not to say that the strength or weakness of the proposition is critical. But it must be established that the challenge does involve a matter arising under the Constitution. The applicant's argument is based on a misunderstanding of the structure of the Family Court.

58 In the present case, the issue of the effect of a failed attempt to amend the Constitution on its proper interpretation has been determined in *New South Wales v The Commonwealth of Australia* (2006) 229 CLR 1; [2006] HCA 52. No basis is shown for re-agitating that decision. In that case, the High Court said:

> [131] There are insuperable difficulties in arguing from the failure of a proposal for constitutional amendment to any conclusion about the Constitution's meaning. First, there is a problem of equivalence. The argument must assume that the proposal which was defeated was as confined as is the question that now falls for determination. If the proposal was wider than the immediate question for decision, it is not open to conclude that a majority of those to whom the proposal was put (whether they are described as "the people of Australia", the "sovereign force" or, as in s 128, "the electors qualified to vote for the election of members of the House of Representatives") reached any view about the ambit of the (unamended) constitutional power, or that they reached any view about that part of the proposal that appears to deal with the immediate issue. None of the proposals relied on in this matter was so confined. And the fact that the early proposals (of 1910 and 1912) were prompted by the decision in *Huddart Parker* does not confine those proposals to the questions that now fall for decision in the present matters.
>
> [132] Secondly, despite Harrison Moore's optimistic view that the constitutional alteration mechanism provided by s 128 was a "less cumbrous" way for avoiding the obstacle of disagreement between the Houses of Parliament than the deadlock provisions of s 57 of the Constitution, few referendums have succeeded. It is altogether too simple to treat each of those rejections as the informed choice of electors between clearly identified constitutional alternatives. The truth of the matter is much more complex than that. For example, party politics is of no little consequence to the outcome of any referendum proposal. And much may turn upon the way in which the proposal is put and considered in the course of public debate about it. Yet it is suggested that failure of the referendum casts light on the meaning of the Constitution.
>
> [133] Finally, is the rejection of the proposal to be taken as confirming what is and always has been the meaning of the Constitution, or is it said that it works some change of meaning? If it is the former, what exactly is the use that is being made of the failed proposal? If it is the latter, how is that done? The plaintiffs offered no answers to these questions.
>
> [134] Constitutional construction is not so simple a process as the argument from failed referendums would have it.

59 The plaintiff's submission that the failure of the referendum in 1937 leads to the conclusion that the Commonwealth Parliament has no power to legislate for matters related to aircraft must be rejected. The submission misunderstands a number of aspects of constitutional law. The Commonwealth's power to legislate in the present case seems clearly to derive from the defence power and probably, as the defendant submits, in relation to aircraft generally, from the external affairs power. In particular, s 8 of the *Airspace Act* requires that the Minister's Australian Airspace Policy Statement be consistent with the Chicago Convention. That Convention also provides the background to, and basis for, the *Air Navigation Act 1920* (Cth). Although that Convention is a Convention on International Civil Aviation (see Sch 1 to the *Air Navigation Act*), it is the basis for a number of pieces of legislation concerned generally with airspace and aircraft use including the *Airspace Act* and the *Air Services Act*.

60 The failure of the referendum does not lead to a conclusion that legislation relating to aircraft movements is invalid because the Commonwealth Parliament has no power to enact such legislation.

61 No other matter raised by the plaintiff involves a matter arising under the Constitution or its interpretation. No basis is shown for adjourning the proceedings so that s 78B notices can be served on the Attorneys-General.

62 Further, to the extent that the Commonwealth does not have power under the Constitution in relation to air navigation (and that proposition is highly unlikely), that power would rest with the State governments. The plaintiff's submission that the failure of the referendum means that the Parliament of New South Wales has no power to legislate, at least in terms of s 72 of the CLA, must also be rejected. The power of the Parliament of New South Wales to enact such a measure derives from s 5 of the *Constitution Act 1902* (NSW), and not from ss 106 to 108 of the Commonwealth Constitution. Contrary to the plaintiff's further submission, s 72 of the CLA is not inconsistent with any law of the Commonwealth.

63 Even if, contrary to what I have earlier determined, the plaintiff had some rights in relation to aircraft flying over her property, s 72 of the CLA is a complete answer to such rights based on trespass or nuisance.

Breach of contract

64 The plaintiff claims to have entered into a contract with the RAAF whereby the Commonwealth must pay to her amounts she has specified in invoices delivered to the RAAF. The plaintiff claims that a contract came into existence in this way. She forwarded what she called "cease and desist" notices to the RAAF. The first such notice, dated 15 June 2020, said that the plaintiff insisted that the RAAF cease and desist from flying their planes over her property. She claimed, on the basis of *Plenty v Dillon* (1991) 171 CLR 635; [1991] HCA 5, that the RAAF was trespassing on her property. She required the RAAF to provide her,

> with the RAAF's exemption from my right to quiet enjoyment of my property as well as their exemption from my fee simple title.

65 Squadron Leader Olivia Stuart-Atkinson from the RAAF responded to the notice on 26 June 2020. She said that she was responding "to the aircraft noise complaint titled 'Cease and desist notice'". She explained, amongst other things, that the aircraft were authorised to fly where they did, and at the altitudes (3000 feet and upwards) they did.

66 The plaintiff sent what she described as a "Second Notice" on 14 July 2020, saying that her initial correspondence was not a noise complaint. That letter challenged the validity of any law which the RAAF was relying upon to justify the aircraft movements.

67 It appears there was no response to that letter, and on 30 July 2020 the plaintiff sent a further letter which she described as "a third and **final** Cease and Desist Notice". The letter went on to say, relevantly:

> I will afford the RAAF a **final** 7 days from the date of this correspondence to provide any lawful authority which you believe authorises the RAAF the right to cross the border of my property and trespass on it. Your failure/refusal to provide me with a copy of any such claimed lawful authority by 1pm Thursday 6th August 2020, will be taken as acquiescence that the RAAF consents to, and agrees to be bound by, the following Terms and Schedule of Fees:
>
> 1. A breach of the border surrounding 9150 Pacific Highway Bulahdelah NSW 2423 (hereafter referred to as 'my property') will incur a fee of $ALID167,000 plus a further $AUD167,000 for each subsequent breach. This being compensation for breaching my lawful right to quiet enjoyment of my property, as well as my lawful right to the alienation of my property from the Crown.

> 2. The border of my property extends to the centre of the earth and to the expanse of the universe.
>
> 3. A breach will be considered to be the crossing of any part or section of my border by any Royal Australian Air Force (hereafter referred to as the 'RAAF') aircraft, equipment, vehicle, personnel, artificial intelligence, drone or any other thing that is under the control of the RAAF (hereafter referred to as 'aircraft').
>
> 4. If two aircraft cross the border of my property at any interval in time it will be taken as two separate breaches.
>
> 5. If the same aircraft crosses the border of my property on two or more occasions, regardless of the interval in time, it will be taken to be two or more breaches.
>
> 6. The onus will be on the RAAF to prove that a breach did not occur.
>
> 7. Upon receiving an invoice for a breach/breaches of the border of my property, the RAAF agree to pay the total invoice within 14 days of the invoice date.
>
> 8. Failure to pay the invoice in full in the time allotted will result in the commencement of legal action where I will seek further compensation plus cost and copies of correspondence sent, to date, shall be tendered to the court in the question of such costs.

68 Squadron Leader Stuart-Atkinson sent a further letter dated 5 August 2020 setting out the legal basis for the aircraft movements, and providing some information in relation to aircraft noise. The letter offered that if the plaintiff was not satisfied she could contact the Aircraft Noise Ombudsman.

69 On 6 August 2020 the plaintiff wrote again to the RAAF, reiterating that her letters were not complaints but instructions to stay outside the border of her property. The letter said that the deadline for the RAAF to remain outside her property was 1pm on the day of the letter. The letter then went on to say:

> Any trespass of my property from 1pm Thursday 6 August 2020, will be taken as acquiescence that the RAAF consents to, and agrees to be bound, by the following Terms and Schedule of Fees:

Those terms were the same eight terms as were contained in the letter of 30 July 2020.

70 The plaintiff submitted that a contract came into existence “by acquiescence”, when the RAAF continued to fly planes over her property after 1:00pm on 6 August 2020.

71 I reject the plaintiff’s submission.

72 In *Australian Woollen Mills Pty Ltd v The Commonwealth* (1954) 92 CLR 424, the High Court said at 457:

> It is of the essence of contract, regarded as a class of obligations, that there is a voluntary assumption of a legally enforceable duty. In such cases as the present, therefore, in order that a contract may be created by offer and acceptance, it is necessary that what is alleged to be an offer should have been intended to give rise, on the doing of the act, to an obligation. … [I]n the absence of such an intention, actual or imputed, the alleged "offer" cannot lead to a contract: there is, indeed, in such a case no true "offer".
>
> A test which has not seldom been applied in such cases in order to determine whether a contract has been made or not is to ask whether there has been a request by the alleged promisor that the promisee shall do the act on which the latter relies.

73 No contract came into existence between the plaintiff and either the RAAF or the Commonwealth. A party cannot bring into existence a contract with another party without some form of agreement, express or implied, by the other party, and ordinarily consideration would need to move between the parties. Where, as here, one party has

the right to carry out an activity (fly aircraft over the plaintiff's property), the plaintiff cannot show that she provides any consideration to the RAAF that entitles her to charge them for doing what they are otherwise entitled to do.

74 Parties also must intend to enter into legal relations, and that is determined objectively: *Placer Developments Limited v The Commonwealth of Australia* (1969) 121 CLR 353 at 366. There is nothing in the evidence to suggest that the RAAF intended to enter into legal relations with the plaintiff, and everything to suggest that it did not so intend, because it claimed a right to fly over the plaintiff's land.

75 In asserting that a contract came into existence by acquiescence, the plaintiff misunderstands the meaning of the term in law. The closest meaning the term has in relation to what the plaintiff is asserting is probably equitable estoppel by acquiescence. That prevents a person, who has knowingly permitted another to act through mistake to his own detriment and to the advantage of the former, from profiting by the other's mistake: *Ramsden v Dyson* (1866) LR 1HL 129 at 168; *Discount and Finance Ltd v Gehrig's NSW Wines Ltd* (1940) 40 SR (NSW) 598 at 603. *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*, 6th Ed., at para 38-015 says that acquiescence "in its proper sense" occurs where a party having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. The authors are critical of the term, saying it is used in imprecise and inconsistent senses, particularly when used in conjunction with the terms "laches", where it may mean delay coupled with prejudice.

76 By using the term "acquiescence", the plaintiff appears to be asserting that the RAAF agreed to the unilateral terms the plaintiff put to it, namely, by continuing to do what the plaintiff said she would charge them for. That is not acquiescence as the law understands it. Nor is a contract constituted in that way.

77 The plaintiff's claim based on a breach of contract is without any foundation.

Negligence

78 The plaintiff refers in a number of places in her statement of claim to "gross negligence", but if she has any cause of action in this regard she needs only to demonstrate negligence.

79 No particulars of negligence are set out in the statement of claim, nor asserted in correspondence between the parties. Rule 15.1 UCPR requires a pleading to give such particulars of any claim pleaded as are necessary to enable the opposite party to identify the case that the pleading requires it to meet. Rule 15.5 relevantly provides:

> **15.5 Allegations of negligence and breach of statutory duty in common law claims in tort (cf SCR Part 16, rule 4; DCR Part 9, rule 22; LCR Part 8, rule 4)**
>
> (1) The particulars to be given by a pleading that alleges negligence (whether contributory or otherwise) -
>
> (a) must state the facts and circumstances on which the party pleading relies as constituting the alleged negligent act or omission, and

> (b) if the party pleading alleges more than one negligent act or omission, must, so far as practicable, state separately the facts and circumstances on which the party relies in respect of each alleged negligent act or omission.

80 The facts the plaintiff pleads are not capable of demonstrating negligence. They are facts which, were there not other insuperable barriers in her way, would only establish trespass or nuisance. The principal barrier that precludes a cause of action in negligence is that the RAAF does not owe a duty of care to the plaintiff not to fly aircraft over her property.

Biosecurity

81 In her amended statement of claim, the plaintiff pleads that she has a biosecurity management plan under the *Biosecurity Act 2015* (NSW) in respect of Merino sheep and Plymouth Rock chickens which the plaintiff raises on her property. The plaintiff pleads that the continual entry into her property of the RAAF planes is a potential biosecurity risk. She pleads that the planes may be carrying pest and disease, and that a breach of the *Biosecurity Act* exposes the RAAF to a penalty of $440,000. The pleading does not put the matter higher than the flights being a potential biosecurity risk. The plaintiff does not identify which provisions of the Act have been, or might be, contravened.

82 Biosecurity management plans are governed by Div 12 of Pt 2 of the *Biosecurity Regulation 2017* (NSW). The contravention the plaintiff has in mind may well be contained in cl 44C of the Regulation which provides:

> **44C Compliance with biosecurity management plans**
>
> (1) A person who enters or who is at or in a management area and who deals with biosecurity matter or a carrier must, while in the area, comply with the applicable requirements of the biosecurity management plan.
>
> (2) A person is not required to comply with a biosecurity management plan for a place unless a notice setting out the following matters is conspicuously posted at each entrance to the place -
>
> (a) that persons entering a management area at the place must comply with the biosecurity management plan and that failure to do so may be an offence under the *Biosecurity Act 2015*,
>
> (b) how a copy of the plan may be obtained,
>
> (c) contact details of a person who can explain the obligations under the plan.

83 The definition of a biosecurity matter in s 10 of the *Biosecurity Act* includes any living thing other than a human or any part of an animal. However, the flying of aircraft over the plaintiff's land is not a dealing with a biosecurity matter.

84 Although s 25 of the *Biosecurity Act* makes it a criminal offence to contravene a mandatory measure that applies to a biosecurity matter, the difficulty for the plaintiff is that s 6 of the Act provides:

> **6 Act does not give rise to or affect civil cause of action**
>
> (1) A provision of this Act does not confer a right of action in civil proceedings based on a contravention of the provision.

85 Accordingly, the plaintiff has no cause of action based upon any alleged breach of the *Biosecurity Act*, the Regulations or any management plan.

Privacy

86 In *Lenah Game Meats*, there was discussion in a number of the judgments about the possibility of the development of a tort of privacy, but the High Court expressly held back from saying that such a tort existed, or whether it was likely that it might be held to exist at any future time, partly because of conflicting considerations: see at [40]-[42] per Gleeson CJ, [106]-[132] per Gummow and Hayne JJ, and [189]-[190] per Kirby J. In *Kalaba v Commonwealth of Australia* [2004] FCA 763, Heerey J reviewed the few authorities that had, to that time, discussed the issue, and held that the weight of authority was against the proposition that a tort of privacy existed. In *Gee v Burger* [2009] NSWSC 149, McLaughlin AsJ thought at [53] that the matter was arguable.

87 The difficulty for the plaintiff in the present case is that, even if such a tort existed, any rights based on it would be subject to the statutory authorisation for the flying of aircraft by the RAAF over the plaintiff's property. The plaintiff does not have an arguable claim for breach of privacy.

Harassment

88 The amended statement of claim referred only to harassment when seeking aggravated damages. The plaintiff addressed no submissions to the issue of harassment, nor did she explain any entitlement to damages from harassment. The law does not know any such basis for a claim for damages. At best, a person might be entitled to an Apprehended Violence Order if they were being harassed by another person. The concept is irrelevant to the facts as pleaded.

Conclusion

89 The plaintiff does not demonstrate any right to prevent the flight of the RAAF aircraft over her land. On the contrary, the RAAF has a lawful entitlement to do so. The plaintiff fails to make out a prima facie case for an interlocutory injunction. None of the claims made by the plaintiff in her statement of claim discloses a reasonable cause of action.

90 Accordingly, I make the following orders:

(1) Dismiss the plaintiff's notice of motion for default judgment filed 9 December 2020.

(2) Dismiss the plaintiff's notice of motion filed 28 January 2021.

(3) Order that the proceedings be dismissed pursuant to r 13.4 of the *Uniform Civil Procedure Rules 2005* (NSW).

(4) Order that the plaintiff pay the defendant's costs of the plaintiff's notice of motion filed 28 January 2021, the defendant's notice of motion filed 23 December 2020, and of the proceedings.

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Decision last updated: 15 April 2021