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Benchmark

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Daily Banking

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (One Minute Read)

Lazicic v Rossi (NSWSC) - Magistrate failed to give adequate reasons for finding that a claimant who had hired a car after an accident had acted reasonably in mitigation of loss

Princess Theatre Pty Ltd & Ors v Ansvar Insurance Limited (VSC) - theatre owner was entitled to indemnity for covid losses from its industrial special risks insurer

Hanson Construction Materials Pty Ltd v Decmil Australia Pty Ltd (VSC) - adjudicator under the *Building and Construction Industry Security of Payment Act 2002* (Vic) erred in taking an excluded amount into consideration

Sumervale Pty Ltd v Viva Energy Refining Pty Ltd (VSCA) - land in industrial area still burdened by restrictive covenants designed to ensure residential amenity - removal of covenants sought to enable use as service station - nearby service station owners could not rely on loss of absence of competition as an injury justifying maintenance of the covenants

Wang v Hur (QCA) - appellate court refused to admit new evidence regarding errors of translation and interpretation in the evidence below - appeal dismissed

McCagh v Rural Bank (WASCA) - borrowers failed in appeal against judgment given after a trial in which they had refused to participate

Summaries With Link (Five Minute Read)

Lazicic v Rossi [2024] NSWSC 777
Supreme Court of New South Wales
Kirk J
Torts - Lazicic crashed into a relatively new Honda Civic owned and driven by Rossi - Lazicic's insurer accepted Lazicic was at fault and liable in negligence to Rossi for the value of the Honda, which was written off - Rossi rented a Hyundai i30 for 86 days, until his insurer provided him with a replacement Honda Civic - there was no dispute that it was reasonable for Rossi to hire an i30 for 86 days - the care hire company charged nearly $30,000 for the hire, which was greater than the purchase price of the i30 - the insurer refused to pay this amount - Rossi commenced proceedings in the Local Court, and the Magistrate upheld the claim for the rental cost - Lazicic appealed to the Supreme Court on questions of law - held: despite allowances that had to be made in the case of Local Court Magistrates with crushing caseloads and few resources, there remains a duty to provide reasons which consider and address the core matters of law or fact in dispute between the parties - the reasons should be sufficient for it to be apparent to the parties that those core matters have been grappled with, in a reasoned way, and such that they can consider the merits of any appeal - the Magistrate failed to provide adequate reasons for finding that Rossi acted reasonably in mitigating his loss - to speak of a cost being outside the reasonable "range" is at best the language of conclusion - rather, the test as whether or not Rossi acted reasonably in acting as he did such as to incur the rental cost for which he was claiming reimbursement - a claimant will not win simply by pointing to a range of market prices and saying the rate chosen was not the most expensive one - neither excessive diligence nor perfection is required of a claimant - the Magistrate failed to address the evidence and Lazicic's submissions in relation to mitigation of loss, which was the only live issue in the case - appeal allowed, and matter remitted to the Local Court for determination according to law.
View Decision

Princess Theatre Pty Ltd & Ors v Ansvar Insurance Limited [2024] VSC 363
Supreme Court of Victoria
M Osborne J
Insurance - the owner of several theatres in Melbourne claimed under an extension to its industrial special risks insurance policies for two periods of insurance for about $20million of losses sustained as a result of the covid lockdowns in 2020 and 2021, which occurred pursuant to a series of directions issued by the Victorian government and associated advice - the Insurer denied the extension was engaged, and said that, if it were, it should be rectified such that indemnity was excluded on the basis that the parties had a common intention, known to each other, that a proviso the extension should be rewritten such that 'declared to be quarantinable diseases under the *Quarantine Act 1908*' was replaced with 'listed as a human disease pursuant to the *Biosecurity Act 2015* (Cth)' - held: insurance policies are to be given a business-like interpretation in accordance with the principles for general commercial contracts - construction of a policy will be approached on the basis that the parties intended to produce a commercial result and constructions that make for commercial nonsense or would work commercial

inconvenience should be avoided - the *contra proferentem* rule applies to ambiguities but is generally is a doctrine of last resort and has perhaps limited vitality - on its proper construction, the insured was entitled to cover under the extension unless the proviso applied - to obtain rectification, the insurer had to demonstrate that, at the time of entry into the policies, the parties had a common intention and that the written instruments did not conform to that common intention - the fact that both insured and insurer may have believed that the wording of the proviso excluded cover did not entitle the insurer to rectification, unless it could point to a common intention that cover would be excluded even if the proviso did not have that effect - no one turned their mind to that circumstance - rectification refused - a $500,000 sublimit applied in each period of insurance with respect to each of the four venues, so the maximum amount of the insurer's liability in each period of insurance was $2million, such that the maximum liability of the insurer was $4 million - the Court calculated an indemnifiable loss of about $800,000 for the first period and $2million for the second period.
Princess Theatre Pty Ltd & Ors

Hanson Construction Materials Pty Ltd v Decmil Australia Pty Ltd [2024] VSC 361
Supreme Court of Victoria
Stynes J
Administrative law - Decmil subcontracted Hanson to supply and deliver concrete and associated mixing, testing and pouring services for the construction of 52 wind turbines - Hanson served a payment claim under the *Building and Construction Industry Security of Payment Act 2002* (Vic) in relation to a foundation - Decmil responded with a payment schedule stating a nil amount to be paid, on the basis that the foundation was defective and that Decmil was entitled to set off the costs of rectification, which were greater than the amount of the payment claim - an adjudicator under the Act found that the foundation was defective, Decmil was entitled to a set off, but in an amount less than the payment claim, leaving an amount of about $700,000 payable to Hanson under the payment claim - Hanson sought judicial review of the adjudicator's decision - held: the rectification costs claimed by Decmil were an excluded amount for the purpose of s10B of the Act - an "excluded amount" relevant includes "any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract" - s23 provides that, in determining an adjudication application, the adjudicator must not take into account any part of the claimed amount that is an excluded amount - there is an important difference between the NSW and Victorian Acts, in that the Victorian Act includes s23(2B), which relevantly provides that if an adjudicator's determination takes into account an excluded amount, it is void to that extent - the Victorian Supreme Courts is also more willing than the NSW Supreme Court to order remittal of a matter to an arbitrator where jurisdictional error is established - adjudication decision quashed in so far as the adjudicator took into account the costs of rectification, and adjudication application remitted to the adjudicator to determining the adjudicated amount in accordance with law.
Hanson Construction Materials Pty Ltd

Sumervale Pty Ltd v Viva Energy Refining Pty Ltd [2024] VSCA 140
Court of Appeal of Victoria
Niall JA, Richards, & J Forrest AJJA
Restrictive covenants - the respondent intended to construct a service station on land that it owned, which would dispense hydrogen, gasoline, and diesel, and which would offers fast charging stations for battery electric vehicles - it could not do so because of four restrictive covenants requiring that there only be a single dwelling on the land, and that there could be no building erected on the land, other than a dwelling house, school, church or hall and outbuildings thereto, and there could be no trade or business carried out on the land - the respondent applied under s84(1)(c) of the *Property Law Act 1958* (Vic) for the discharge of the restrictive covenants - two owners of nearby land having the benefit of the covenants objected - these owners were both petroleum companies who wished to avoid the respondent setting up a competing service station - the primary judge ordered the covenants discharged (see Benchmark 12 July 2023) - the owners sought leave to appeal - held: s84(1)(c) directs attention to whether the proposed modification or removal will 'substantially injure' the persons entitled to the benefit of the restriction - s84(1)(c) hinges on the existence of a substantial injury and not merely the loss of the benefit of the restriction - the textual distinction between injury and the loss of the benefit of the restriction also directs attention to the practical consequences that the removal or modification of the restriction might produce - the logic of s84(1)(c) requires some connection, justifying the retention of the restriction, between the covenant and the injury - a mere consequential or causal connection is not enough - to construe the concept of injury as tantamount to the loss of any benefit still being enjoyed would compel the refusal of an application unless the restriction were obsolete, and then, since s84(1)(a) applies in cases of obsolescence, this would leave s84(1)(c) with very little, if any, work to do - therefore, the purpose of the covenant constrains the kind of injury that might be occasioned by the modification or removal of the restriction - leave to appeal granted but appeal dismissed.
Sumervale Pty Ltd

Wang v Hur [2024] QCA 126
Court of Appeal of Queensland
Morrison & Bond JJA, & Davis J
Appeals - the appellant alleged she had been misled and deceived by representations made by the respondents to enter into an agreement, and to pay $600,000 in return for 30% of the shares in, and appointment as a director of, one of the respondents - the primary judge dismissed the claim because she was not persuaded the alleged representations had been made, and in any event, would also not have been persuaded that the appellant relied on the alleged representations - the first language of the natural person parties was Mandarin, and the representations were alleged to have been made in Mandarin - the appellant and one of the respondents had given evidence at trial in Mandarin through a certified interpreter - the appellant's solicitor during the trial was a native Mandarin speaker and could read Mandarin - Mandarin documents and agreed English translations were tendered during the trial - the appellant sought to appeal, and to lead new evidence of three alleged translation errors during

the trial, one in a document and two in the appellant's oral evidence - held: the Court was not persuaded that the evidence as to the translation of the document could not have been obtained with reasonable diligence for use at the hearing - the issue of accurate translation of Mandarin documents was obviously an important one in the proceeding below - the Court was also unpersuaded that any concerns as to the accuracy of the interpretation of the appellant's oral evidence not have been addressed with reasonable diligence at the hearing - the appellant's trial solicitor said that he had listened carefully to the oral evidence and the interpretation and did not have any concerns about the accuracy of the translation - both translation and interpretation had been conducted at trial on an agreed basis, and it had been open to the appellant not to agree at trial - application to adduce new evidence on appeal refused - on the appeal, the Court was utterly unpersuaded by the appellant's general proposition that this is a case in which the Court should consider and form its own conclusions on the evidence, and depart from the principles of judicial restraint - no error had been shown on the part of the primary judge in rejecting the relatively confined case presented by the appellant below - appeal dismissed.
Wang

McCagh v Rural Bank [2024] WASCA 68
Court of Appeal of Western Australia
Mitchell, Vaughan, & Vandongen JJA
Banking - a bank sued borrowers to recover money claimed to be owing under five finance facilities - the borrowers did not defend the trial, and the primary judge gave judgment for the bank for about $10million and ordered the borrowers to give possession of mortgaged agricultural land to the bank - two of the borrowers appealed - held: the appellants had made a deliberate choice not to defend the trial - after correspondence with the Court regarding available dates, the appellants had informed the Court that they were withdrawing from any participation in the trial - O34r2 of the *Rules of the Supreme Court 1971* (WA) provides that, when a trial is called on, if a party does not appear the judge may proceed with the trial in the absence of that party - O34r2 provides a mechanism for the absent party to apply to set aside any judgment given, but the appellants had not proceeded in that way, and sought to appeal against the judgment - in the absence of the borrowers at trial it remained necessary for the bank to prove its claim so far as the legal onus of proof rested on the bank - however, an appellant who does not appear at trial cannot assert error by the primary judge merely because the appellant's absence at trial made it easier for the other party to adduce evidence and prove its case - further, such an appellant cannot allege that the primary judge was in error for failing to consider arguments that the appellant now seeks to run on appeal - the borrowers' election not to participate in the trial had the result that there was no evidence whereby it was incumbent on the primary judge to consider and determine all of the issues raised in the borrowers' defence and counterclaim - appeal dismissed.
McCagh

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