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Daily Civil Law
A Daily Bulletin listing Decisions of Superior Courts of Australia

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (One Minute Read)

CBI Constructors Pty Ltd v Chevron Australia Pty Ltd (HCA) - High Court upheld a finding that an arbitral tribunal was functus officio regarding an asserted contractual claim (I B C)

Productivity Partners Pty Ltd v Australian Competition and Consumer Commission (HCA) - findings of unconscionable conduct by a College upheld, and finding of knowing involvement by the CEO also upheld (I B)

Fanatics, LLC v FanFirm Pty Limited (FCA) - primary judge had restrained infringing use of trade marks - limited stay of injunction granted pending appeal (I B)

White Rock Wind Farm Pty Ltd v Dulhunty (NSWCA) - wind farm lessee and lessor fought an appeal on a different basis than they had at first instance - appeal dismissed (B C I)

Bull v Cooldawinda Pty Ltd (NSWSC) - a deceased's son failed to establish a concluded contract with the executor to buy his late father's farm (I B)

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Summaries With Link (Five Minute Read)

CBI Constructors Pty Ltd v Chevron Australia Pty Ltd [2024] HCA 28
High Court of Australia
Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot, & Beech-Jones JJ
Arbitration - a dispute concerning a contract for an offshore oil and gas project conducted by Chevron, known as the Gorgon Project, went to arbitration - the governing law of the contract was that of Western Australia - the arbitral tribunal made a second interim award in which it declared that CKJV was not prevented from advancing, maintaining or contending, whether in whole or in part, a claim that its entitlement to staff costs was to be calculated in a particular way by reason of res judicata, issue estoppel, or *Anshun* estoppel, and that the tribunal was not *functus officio* in respect of that case - Chevron applied to the WA Supreme Court, which held that the tribunal was *functus officio* in respect of that claim - the Court of Appeal dismissed CKJV's appeal - CKJV was granted special leave to appeal to the High Court - held (by majority, Jagot & Beech-Jones JJ dissenting): CKJV and Chevron HAD agreed that the arbitral tribunal would use the UNCITRAL Rules in conducting the arbitration and those Rules directly addressed the making of an award by a tribunal - Art 34(2) of the Rules provides that all awards shall be final and binding, with the implication that multiple awards would not be made on the same issue - unless otherwise agreed by the parties, an arbitral tribunal has authority or jurisdiction to decide the dispute submitted to it by the parties finally and only once - when an award is rendered, the arbitral tribunal is not empowered to revisit the award that it has made - the First Interim Award had therefore been final and binding - the Court of Appeal had found that, by the First Interim Award, the arbitral tribunal had determined all issues of liability and that the relevant case CKJV sought to pursue in the Second Interim Award was a case on liability, and those findings were not challenged in the High Court - the arbitral tribunal had been *functus officio* in relation to this case - the arbitral tribunal's findings concerning res judicata, issue estoppel, and *Anshun* estoppel did not preclude the Supreme Court considering Chevron's application to set aside the Second Interim Award - the Supreme Court had correctly applied a *de novo* standard when reviewing the decision of the arbitral tribunal as to its jurisdiction - Jagot & Beech-Jones JJ would have allowed the appeal on the basis that the scope and effect of the First Interim Award only went to the "admissibility" o the case CKJV wished to pursue, and not the jurisdiction of the arbitral tribunal to deal with it in the Second Interim Award - appeal dismissed.
CBI Constructors Pty Ltd (I B C)

Productivity Partners Pty Ltd v Australian Competition and Consumer Commission [2024] HCA 27
High Court of Australia
Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot, & Beech-Jonss JJ
Consumer law - the appellants were a College that was registered training organisation that offered training schemes under the Commonwealth Vocational Education and Training Fee Higher Education Loan Program and its CEO - ACCC alleged that the College had engaged in a

system of conduct, or pattern of behaviour, that was, in all the circumstances, unconscionable in contravention of s21 of the *Australian Consumer Law*, and that the CEO was knowingly concerned in this contravention - ACCC alleged that certain changes to the College's approval process for its online campus, wherein the appellant claimed revenue from the Commonwealth, was unconscionable, and that the CEO was knowingly concerned in that conduct - the Full Court (by majority) dismissed an appeal (see Benchmark 13 April 2023) - the College and the CEO were granted special leave to appeal to the High Court - held (by Gageler CJ and Jagot J, other justices concurring in the result): the findings of the primary judge, either not challenged or undisturbed on appeal to the Full Court, amply supported the conclusion that the College had engaged in a system of conduct, or a pattern of behaviour, in respect of people who were enrolled in online courses in the impugned enrolment period that was, in all the circumstances, unconscionable in contravention of s21 - it was not necessary for the CEO to know that the impugned conduct was unconscionable for him to be found to have been knowingly concerned in the College's contravention of s21 - it was necessary only that it be proved that the CEO knew the essential matters which together made up the conduct ultimately characterised by the primary judge and the Full Court as unconscionable, not that he knew that the conduct could, let alone would, be so characterised - appeal dismissed.
Productivity Partners Pty Ltd (I B)

Fanatics, LLC v FanFirm Pty Limited [2024] FCA 920
Federal Court of Australia
Bromwich J
Trade marks - FanFirm is an Australian company, which began as a travelling cheer squad for the Australian Davis Cup tennis team in 1997, and expanded into offering travel, tours, and merchandise for (primarily) international sporting events - Fanatics, LLC is a United States corporation based in Florida that operated an online retail store for sports merchandise - FanFirm owned the Australian trade mark FANATICS and a device trade make for a logo that included that word, applicable to certain classes - Fanatics owned trade marks for FOOTBALL FANATICS, FANATICS, SPORT FANATICS, and its own logo as a device mark including the word fanatics, applicable to different classes - each party alleged the other had infringed its trade marks, and sought cancellation of the other's trade marks - the primary judge held that Fanatics was liable for trademark infringement and permanently injuncted Fanatics from using the word mark, and made orders for the rectification of the Register of Trade Marks, and rejected FanFirm's case for misleading or deceptive conduct and passing off (see Benchmark 2 August 2024) - Fanatics was granted leave to appeal, and sought a stay of the injunction pending the outcome of the appeal - held: Fanatics bore the onus of showing a proper basis for a stay that would be fair to all parties - there is a prima facie assumption that the court should not deprive a litigant of the benefit of a judgment in its favour - a stay will usually be granted if there is a real risk that the applicant will suffer prejudice or damage, if a stay is not granted, which will not be redressed by a successful appeal - there was no dispute that the appeal grounds were bona fide, and while FanFirm denied the grounds had merit, the Court was satisfied that there were serious questions to be tried on appeal - the Court was satisfied that

the concerns expressed by Fanatics about consumer protection and returns could be sufficiently met by a more limited stay proposed by FanFirm - there was an indeterminate measure of irrecoverable loss on each side if the stay sought by Fanatics were, or were not, granted, and the Court was unable to say which is greater - the presumptive correctness of the primary judge's decision, and the presumed entitlement of FanFirm to the benefit of that decision, therefore had a greater part to play as a starting point - Court ordered a stay of the injunction for 28 days to enable Fanatics to organise compliance, and thereafter a limited stay that would allow Fanatics to use the marks on global customer care labels and in connection with the return of goods from Australian customers.
Fanatics, LLC (I B)

White Rock Wind Farm Pty Ltd v Dulhunty [2024] NSWCA 202
Court of Appeal of New South Wales
Ward P, Adamson JA, & Griffiths AJA
Leases - White Rock Wind Farm Pty Ltd entered into leases with five landowners for the purpose of the construction and operation of a wind farm - White Rock commenced proceedings against the landowners, claiming that they were obliged under the leases to consent to White Rock entering into a proposed licence deed with TransGrid, granting TransGrid rights of access to an electricity substation then owned by TransGrid, without payments of additional consideration - the primary judge held that the landowners had unreasonably withheld their consent to White Rock granting to TransGrid a non-exclusive licence, and had to provide written consent - White Rock appealed, and the appeal was fought on a different basis by both sides, namely that the relevant clause in the leases that White Rock had relied on below had no application - White Rock's primary position on appeal was that it was entitled under the leases to grant a licence to TransGrid under which it could access the substation, without being obliged to pay any additional consideration to the landholders or obtain the landowners' consent - held: the object of the clause White Rock had relied on below was to prevent White Rock from circumventing restrictions contained elsewhere in the lease on White Rock assigning the leases without the landowners' consent - the grant of the proposed licence to TransGrid would not involve the transfer of any of White Rock's existing proprietary rights or obligations under the leases, and so that clause had no application - White Rock could not validly grant TransGrid access to the substation as proposed in the draft licence deed, and any such access arrangement or agreement had to involve the landowners - it was unnecessary and inappropriate for the Court to prescribe the precise form or content of any such arrangement or agreement, but the Court noted it might involve an easement either agreed or imposed by the Court under s88K of the *Conveyancing Act 1919* (NSW), or agreement to a suitable covenant - appeal dismissed.
View Decision (B C I)

Bull v Cooldawinda Pty Ltd [2024] NSWSC 1011
Supreme Court of New South Wales
Rees J

Sale of land - the plaintiff was the executor of the estate of a deceased - the only asset of substance in the estate was a farm near Byron Bay - one of the deceased's sons was keen to buy the farm but was unable to raise finance - the executor put the farm on the market under an 'expressions of interest' sales regime, and the executor (and other beneficiaries) remained amenable to selling the farm to the son if he could raise the funds to match the highest offer made - the son arranged for a Melbourne businessman to set up a company to buy the farm as trustee for a unit trust, and the businessman paid a deposit being 10% of the then highest offer - contracts were signed by vendor and purchaser but not exchanged - a problem arose when the businessman declined to give a guarantee of the trustee company's obligations, and the son signed as guarantor - the executor received a higher offer from another party, which the businessman and son refused to match, claiming that they had an existing contract to buy the land - the executor commenced proceedings - held: the question whether there was a contract entered into between the parties is essentially a question of fact - the usual practice in NSW is for parties entering into a contract for the sale of land to exchange signed counterparts of a written contract, although the parties can agree otherwise - there was nothing in the solicitors' communications which supported a conclusion that the parties had agreed to form a binding contract before the exchange of contracts for the sale and purchase of land - nor was there anything in the dealings between the sone and the agent which suggested a departure from the usual practice - there had been no exchange, and no concluded contract - the executor had been free to proceed as he did - the identity of the guarantor, while not specified in the contract, still needed to be acceptable to the vendor - an alternative promissory estoppel argument also failed - declaration made that the plaintiff was free to sell the land to an arm's length purchaser who makes the highest unqualified offer.
View Decision (I B)

Poem for Friday

On Friendship (from The Prophet)

By Kahlil Gibran (1883-1931)

And a youth said, Speak to us of Friendship.
And he answered, saying:
Your friend is your needs answered.
He is your field which you sow with love and reap with thanksgiving.
And he is your board and your fireside.
For you come to him with your hunger, and you seek him for peace.

When your friend speaks his mind you fear not the “nay” in your own mind, nor do you withhold the “ay.”
And when he is silent your heart ceases not to listen to his heart;
For without words, in friendship, all thoughts, all desires, all expectations are born and shared, with joy that is unacclaimed.
When you part from your friend, you grieve not;
For that which you love most in him may be clearer in his absence, as the mountain to the climber is clearer from the plain.
And let there be no purpose in friendship save the deepening of the spirit.
For love that seeks aught but the disclosure of its own mystery is not love but a net cast forth: and only the unprofitable is caught.

And let your best be for your friend.
If he must know the ebb of your tide, let him know its flood also.
For what is your friend that you should seek him with hours to kill?
Seek him always with hours to live.
For it is his to fill your need but not your emptiness.
And in the sweetness of friendship let there be laughter, and sharing of pleasures.
For in the dew of little things the heart finds its morning and is refreshed.

Gibran Kahlil Gibran, writer, poet and artist was born in Bsharri, Lebanon on 6 January 1883. His father was later imprisoned for theft. His maternal grandmother was clergy in the Maronite Christian Church. He moved to Boston, USA with his mother and siblings in 1885, but returned to high school in Beirut, Lebanon in about 1898. His mother and two siblings died in 1902, the year he returned to the USA. His sister Marianna then supported them both, taking in work as a dressmaker. The sculptor August Rodin, referred to Gibran

as "*The William Blake of the twentieth century".* Gibran studied art at the Académie Julian in Paris, his fees paid for by Mary Haskell who remained his lifelong friend, supporter and patron. He published *The Prophet* in 1923. That book has now sold more than 10 million copies. The translator of the book, middle eastern historian Juan Cole said of the influence of the book "*Many people turned away from the establishment of the Church to Gibran. He offered a dogma-free universal spiritualism as opposed to orthodox religion, and his vision of the spiritual was not moralistic. In fact, he urged people to be non-judgmental*." Gibran died on 10 April 1931 in New York, of cirrhosis of the liver.

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