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

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### Executive Summary (One Minute Read)

**Bed Bath 'N' Table Pty Ltd v Global Retail Brands Australia Pty Ltd (No 3)** (FCA) - Court determined the scope of declaration and injunction where it had made a finding of misleading or deceptive conduct and passing off - the trade marks claim on which the applicant had failed was not sufficiently distinct to be an issue attracting its own costs treatment (I B)

**DC Rd DC Pty Ltd v Zhang (No 3)** (FCA) - contempt of court charges against a company and its director failed - the Court considered itself bound to follow *obiter dicta* of a majority of the High Court over *ratio decidendi* of the Full Federal Court, so that a party not bound by a court order must be proved to have had actual knowledge that his or her conduct caused a breach of the Court order (I B C)

**C & V Engineering Services Pty Ltd v Metropolitan Demolitions Pty Ltd** (NSWCA) - leave to appeal granted for an appeal over a small amount of money in lengthy litigation, because the proposed ground of appeal raised an important principle of contract law (I B C)

**Nano Logistics Pty Ltd v Harper James Law Group Pty Ltd** (NSWSC) - Court was unable to make the orders sought by the plaintiffs setting aside a costs determination entered as a judgment of the Local Court, where no review by a review panel had been sought (I B)

**AB v XYZ Pty Ltd** (VSCA) - leave to appeal refused against decision of primary judge who did not accept the applicant's evidence of the various events which she claimed had occurred and caused her to suffer injury (I B C)

## Summaries With Link (Five Minute Read)

### **Bed Bath 'N' Table Pty Ltd v Global Retail Brands Australia Pty Ltd (No 3) [2024] FCA 226**

Federal Court of Australia

Rofe J

Misleading and deceptive conduct - BBNT alleged that, by launching a new soft homewares store, GRBA had infringed BBNT's trade marks, contravened s18(1) and s29(1)(a), (g), (h) of the *Australian Consumer Law*, and engaged in passing off - the Court had previously found that GRBA contravened the *Australian Consumer Law* and had engaged in passing off, but rejected the trade mark claims - the parties agreed that: (a) there be an inquiry into damages; (b) GRBA pay BBNT's costs in relation to the *Australian Consumer Law* and passing off claims; (c) leave be granted to appeal from these orders and the Court's previous judgment; and (d) a stay be granted in relation to all orders except as to costs until the determination of the appeal - there was a dispute about the scope of the declaration and injunction sought by BBNT - there was also a dispute about the quantum of costs - held: the Court had not expressly found that GRBA falsely represented that House B&B stores were "sponsored or approved by" BBNT, but rather than it had likely misled or deceived consumers into thinking that House B&B stores are operated by, or otherwise associated with, BBNT - it was clear that GRBA's false representations only extended to "association or affiliation", not "sponsorship and approval" - the declaration would therefore be in the form suggested by GRBA - as to the injunction, the concepts "substantially identical" and "similar" were not nebulous or ambiguous because they find no expression in the *Australian Consumer Law* - Courts regularly make orders utilising those concepts in trade mark cases and the Court considered that GRBA was capable of understanding them for the purposes of complying with the injunction sought by BBNT - injunction made as sought by BBNT that GRBA be restrained from using (a) the House B&B mark; (b) any trade mark which is substantially identical to the House B&B mark; and (c) any trade mark which is similar to the House B&B mark - as to costs, although BBNT did not succeed on trade mark infringement, the issues in the trade mark case could not be sensibly separated from those in the *Australian Consumer Law* and passing off cases - the fact that GRBA succeeded in defending the trade mark case made little, if any, practical difference to the relief ultimately granted - BBNT did not unreasonably bring the trade mark claims, particularly where those claims were so closely associated with the passing off and misleading and deceptive conduct claims - the trade mark claim was not a sufficiently discrete issue in light of the way in which the proceeding was advanced - GRBA should pay BBNT's costs of the whole proceedings including for trade mark infringement but with a discount of 10% to account for succeeding on the trade mark claim.

[Bed Bath 'N' Table Pty Ltd \(I B\)](#)

### **DC Rd DC Pty Ltd v Zhang (No 3) [2024] FCA 221**

Federal Court of Australia

Jackman J

Contempt of court - the applicants commenced proceedings, contending that Zhang had transferred about \$20million from a company he controlled to an account with Bank of China (Hong Kong) Ltd held by another company Zhang controlled - it appeared that \$2.6million of this money was used for the payment of a deposit for the purchase of a commercial property at Belrose - the Court made a freezing order against Zhang and one of his companies - the applicants alleged Zhang and his company had breached the freezing order and filed a statement of charge seeking orders that Zhang and his company be found guilty of contempt of court - held: this judgment dealt only with the question of guilt, in accordance with the usual procedure whereby the issue of alleged contempt is dealt with separately from the issue of penalty - the applicants had failed to discharge the onus of proving beyond reasonable doubt that the conduct of the company in granting a mortgage to secure a loan facility, whereby some of the proceeds of the loan would benefit the company and some of those proceeds would benefit the lender, fell outside the ordinary and proper course of the company's business - the charge against the company therefore failed - as the charge against Zhang presupposed that the company had breached the Court's orders, the charge against Zhang must also failed - however, the Court expressed its views on the charge against Zhang, in case an appeal was successful - the central question (on which the authorities were divided) was whether, where the alleged contemnor is not a party bound by the court order, such a third party is liable for contempt only if it is proved beyond reasonable doubt that the alleged contemnor not only knew of the order but also had actual knowledge that the relevant conduct constituted a breach of the order, and did not honestly but mistakenly believe that the conduct fell outside the scope of the order - the Court considered itself bound to follow the seriously considered *obiter dicta* of a majority of the High Court based on long-established authority in preference to the *ratio decidendi* of a decision of the Full Court of the Federal Court - this High Court *obiter dicta* was to the effect that the liability of the third party depends on the knowledge and intention of that third party to interfere with the administration of justice, and that the third party must be proved to have had actual knowledge that his or her conduct has caused a breach of the order to occur - the charge against Zhang was therefore defective in that it contained no allegation that Zhang had actual knowledge that the grant of the second mortgage by his company constituted or caused a breach of the freezing order against that company.

[DC Rd DC Pty Ltd](#) (I B C)

## **C & V Engineering Services Pty Ltd v Metropolitan Demolitions Pty Ltd [2024] NSWCA 52**

Court of Appeal of New South Wales

Leeming & Stern JJA

Appeals - C&V Engineering Services was a steel fabricator, and Metropolitan Demolitions was a demolitions contractor - Metropolitan was engaged by the head contractor of the development of three buildings in Circular Quay - C&V was subcontracted to Metropolitan as steel fabricator for the development - C&V sued Metropolitan for sums it said were owing in respect of contracts for procurement and fabrication of steel soldiers for two of the buildings - a steel soldier is a form of pile that goes into the ground to support an excavation - the primary judge dismissed





C&V's claim with respect to one building (Building C), but upheld it in part regarding the other building (Building B) - quantum was referred to referee, and judgment was eventually given for about \$42,000 - C&V appealed - the Court of Appeal allowed an appeal in part, and remitted the question of quantum regarding Building C to the trial judge, with it being a matter for the trial judge whether that question should be referred to a referee (see Benchmark 25 July 2023) - a referral for quantum of damages for breach of contract in relation to Building C was made - the referee was instructed (over objection by C&V) to assess quantum on alternative bases: that C&V was entitled to damages without any temporal limitation, or that C&V had no entitlement to damages for breach of contract in respect of work done after the date on which Metropolitan instructed C&V to do no further work - the primary judge adopted the referee's report - the primary judge held that C&V's conduct in continuing to fabricate the soldiers for Building C after the direction was given was an intervening event precluding C&V from claiming damages for breach of contract in respect of work done under the contract after the date of the direction - C&V sought leave to appeal, which was required because the amount in issue was only about \$40,000 - held: ordinarily, it is appropriate to grant leave only concerning matters involving an issue of principle, questions of general public importance, or where an injustice is reasonably clear, in the sense of going beyond being merely arguable - notwithstanding the small amount in issue, and that this litigation had been ongoing for some time, C&V's single ground of appeal raised an issue of principle, namely whether relying on repudiation as an intervening act for the purpose of causation "eviscerates" the general rule that an innocent party faced with repudiation can either accept the repudiation and terminate the contract or reject the repudiation and insist on contractual performance - leave to appeal granted.

[View Decision](#) (I B C)

## **Nano Logistics Pty Ltd v Harper James Law Group Pty Ltd [2024] NSWSC 251**

Supreme Court of New South Wales

Chen J

Costs - the plaintiffs retained the defendant law firm to provide legal services in connection with a breach of contract dispute, which was later determined by the Court - the law firm applied to have its costs assessed, and filed the resulting costs certificate in the Local Court registry of, and the amount of that certificate (about \$10,000) became a judgment of that Court - the law firm now sought to enforce that judgment against the second and third plaintiffs (the directors of the first plaintiff) by the filing and service of a bankruptcy notice upon them - the plaintiffs agreed that they entered into, and signed, a Costs Disclosure & Cost Agreement with the defendant, but said that this agreement was a "sham", which was never intended to be binding between the parties, and that there was an underlying verbal agreement with the defendant that all legal fees, costs, and disbursements would be no more than 20% of the monies recovered from the judgment in the breach of contract dispute - held: the costs assessment had not been the subject of a review by a review panel, nor had an application been filed for such a review to occur - the plaintiffs submission that the Supreme Court has general jurisdiction to hear an appeal on a costs assessment was only partly accurate - a party to a costs assessment can only appeal to the Supreme Court when that costs assessment has been the subject of a review

by a review panel - there was therefore no basis to grant the plaintiffs leave to appeal out of time to the Supreme Court - the Court has power to grant a stay of any proceedings before it under s67 of the *Civil Procedure Act 2005* (NSW) - however, here there were no proceedings before the Court, only a summons seeking a stay - the Supreme Court had not made any orders, and the judgment entered was in the Local Court - the Court was of the view that the issuing of the Certificate of Determination of Costs does not constitute a "proceeding" within s67 - the only way the Supreme Court could set aside a judgment of the Local Court would be following an appeal or proceedings for judicial review - there were no such proceedings in the Supreme Court - there was no basis to make the orders sought by the plaintiffs.

[View Decision](#) (I B)

## **AB v XYZ Pty Ltd [2024] VSCA 31**

Court of Appeal of Victoria

Beach & Kennedy JJA, & J Forrest AJA

Accident compensation - in 2007, AB commenced employment with XYZ in a contract role to assist with a merger in which XYZ was involved - AB's employment with XYZ came about as a result of an acceptance by her of an offer of employment by XYZ's managing director, with whom she had previously been involved in a casual sexual relationship for some months in 2004/2005 - in 2008, AB's employment was terminated - in 2012, AB made a claim against XYZ under the *Accident Compensation Act 1985* (Vic) for compensation in respect of post-traumatic stress disorder, depression and associated injuries, which she alleged had been caused by sexual assault and associated harassment and abuse - ultimately, the County Court, while rejecting the evidence of the managing director, did not accept AB's evidence of the various events which she claimed had occurred and caused her to suffer injury - AB now sought leave to appeal - held: the case AB sought to make in on appeal was not the case she advanced at trial - the case at trial was essentially conducted on the premise that the repeated assaults (mostly sexual) produced AB's psychiatric condition; but it was also alleged by her that this was combined with bullying and harassment - AB now sought to allege that the primary judge should have considered the entire conduct of XYZ and the managing director and the circumstances that prevailed (on this application described by AB as stressors) in the workplace over the relevant time - there was no error in the primary judge's references to, and application of, *Briginshaw* - the primary judge had not failed to take into account any matter that formed part of the substance of AB's claim - there was no failure by the primary judge to make relevant findings - the primary judge had the benefit of seeing and hearing AB give evidence over three days during the course of the trial, and, in considering AB's credit, the Court of Appeal was at a considerable disadvantage from that enjoyed by the judge - in such circumstances, the Court would not lightly overturn the findings on credit of the primary judge - there was nothing improper in anything XYZ's trial counsel submitted to the judge, and nothing in the cross-examination of AB, which might now justify the Court in granting leave to appeal or allowing AB's appeal - the primary judge had not failed to afford procedural fairness to AB - leave to appeal refused.

[AB](#) (I B C)

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