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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)

Tonk Sydney Pty Ltd v ILend Capital Pty Ltd (NSWSC) - purported contracts entitled a loan broker to fees was subject to a condition precedent that the deal for which the loan was required would go ahead (I B)

Rogers Construction Group Pty Ltd v Mirage Interiors & Construction Pty Ltd (NSWSC) - Court rejected judicial review application where an adjudicator under the *Building and Construction Industry Security of Payment Act 1999* (NSW) found there was an oral contract that superseded an earlier written contract (I B C)

T2 (by his tutor T1) v State of New South Wales (NSWSC) - State of NSW found liable in negligence after a high school student was assaulted by other students after school in a park outside school grounds (I)

A. Atanasov Nominees Pty Ltd v Cooney (VSC) - Magistrate who had decided to summarily dismiss proceedings at an application for default judgment had denied procedural fairness, and had also had no power to dismiss the proceedings (I B)

Shearer v Super Start Batteries Pty Ltd (QCA) - primary judge had correctly rejected a claim of misleading or deceptive conduct arising out of an agreement to sell batteries (I B)

Summaries With Link (Five Minute Read)

Tonk Sydney Pty Ltd v ILend Capital Pty Ltd [2024] NSWSC 1350
Supreme Court of New South Wales
Richmond J
Contracts - ILend claimed brokerage fees and a commitment fee from the plaintiffs, which it claimed was payable pursuant to agreements between ILend and the plaintiffs in relation to a proposed loan from a third party to the plaintiffs to purchase property at Cronulla - the plaintiffs contended that they did not enter into the agreements with ILend, and, if they did, the claimed amounts were not payable - ILend lodged caveats over property owned by directors of the plaintiffs, and registered security interests against each of the plaintiffs on the Personal Property Securities Register - the plaintiffs commenced proceedings, seeking declarations that there was no intention by the plaintiffs to enter into legal relations with the defendants as set out in the agreement, and that ILend had procured the plaintiffs' directors' signatures on the agreements by misleading and deceptive conduct - ILend cross-claimed for the amounts it said it was owed - held: an agreement is not contractually enforceable unless a reasonable person in the position of each party would think that the other intends to create legal relations - a document which to outward appearances constitutes a contract may be subject to a condition precedent which prevents it from being binding until the condition precedent is satisfied - on the evidence, the arrangement discussed between the parties for ILend to have a mandate to procure an offer for finance for the plaintiffs was subject to a condition precedent that the plaintiffs were successful in entering into a contract to purchase the Cronulla property - as this condition was never satisfied, the contracts did not come into existence - if this conclusion was wrong, and the contracts did come into existence, they would have been shams, in the sense of being a mere piece of machinery (indeed a worthless piece of paper) for serving some purpose other than that of constituting the whole of the arrangement which it purports to give effect, and the claimed fees would not have been payable, as ILend would not have performed the service for which it claimed to be entitled to receive payment - declarations made as sought.
View Decision (I B)

Rogers Construction Group Pty Ltd v Mirage Interiors & Construction Pty Ltd [2024] NSWSC 1344
Supreme Court of New South Wales
Stevenson J
Security of payments - Rogers Construction engaged Mirage to provide services involving the supply and installation of walls, ceilings and partitions at the Busby Fire Station under a lump sum contract - Mirage contended there was a further oral contract, which Rogers denied - Mirage served a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) for an amount it said was owing under the oral contract which was on a costs plus basis - an adjudicator under that Act found that there was an oral contract as alleged by Mirage, and that contract was separate and distinct from the earlier lump sum contract, and there was no overlapping scope of work - Rogers applied for judicial review of the adjudication decision, on the basis of lack of procedural fairness in that the adjudicator decided the matter on a basis not advocated by either party and which neither party, particularly Rogers,

could reasonably have contemplated - held: there will rarely be a basis for quashing an adjudication determination for want of procedural fairness - the adjudicator had found that the agreement was that all work done from a particular date was to be on a cost plus basis and under the oral contract - this is what Mirage had contended - Rogers' adjudication response showed that it was alive to the "scope overlap" point, and had made a submission about it - the adjudicator appeared to have included, perhaps as an alternative finding, that the oral contract constituted a variation of the original contract, which neither party had contended - however, Rogers had anticipated such an argument in its adjudication response - the challenge to the adjudication decision failed.
View Decision (I B C)

T2 (by his tutor T1) v State of New South Wales [2024] NSWSC 1347
Supreme Court of New South Wales
Harrison AsJ
Negligence - the plaintiff was high school student who was assaulted by about 12 students after school in a park near the school - he sued the State of NSW as the occupier and person having the care, management and control of the school - the State admitted it owed the plaintiff a duty of care, but denied it had breached it, as the assault occurred after the end of the school day in a park that could not be supervised by any staff - held: the Court should draw a *Jones v Dunkel* inference against the State as the two head teachers who supervised the students when they left the relevant gate of the school were not called to give evidence - the duty of care a school owes to its students is non-delegable - the school owed the plaintiff a duty to take reasonable care to prevent injury to him on the assumption he was using reasonable care for his own safety - taking into account the State's suspension and expulsion policy and the recommendations made by the school counsellors, the school failed to undertake a comprehensive risk assessment prior to the return from an earlier suspension of the student who had led the assault - the school failed to comply with its own procedures in failing to disseminate information to alert the head teachers about that student's long suspension and his subsequent return to the school - the scope of the duty of care included taking reasonable steps to ensure that a school student, such as a vulnerable student like plaintiff, could depart the school in a safe manner - given that the plaintiff had diagnosed physical and psychological conditions and was previously the subject of bullying at the school prior to the assault, the risk to him was reasonably foreseeable - the probability of harm to the plaintiff, as a forward-looking assessment at the time of the assault, was a significant one, as the school knew that the other student was a physical aggressor and had dealt with his bullying previously - the State had breached its duty of care - factual and legal causation were also established - damages of $290,000 non-economic loss, $500,000 for future economic loss, and $400,000 for future medical expenses awarded, with the parties to perform calculations regarding several other heads of damages.
View Decision (I)

A. Atanasov Nominees Pty Ltd v Cooney [2024] VSC 653
Supreme Court of Victoria

Daly AsJ
Administrative law - Allcar operated a tow truck business - Cooney was a former employee of Allcar - Allcar alleged Cooney breached the employment agreement by misuse of confidential information and by his interference with the employment relationships between Allcar and two of its employees - Allcar commenced proceedings in the Magistrates Court seeking injunctive relief and punitive damages in the sum of $40,000 - Cooney did not file a defence and sought default judgment - the Magistrate made findings regarding the credibility and weight of the Allcar's evidence, and found Allcar had not established Cooney's alleged breaches had induced the two employees to leave Allcar's employ, or that Allcar had suffered the losses claimed by it, and dismissed the proceedings - Allcar appealed - held: for all practical purposes, the Magistrate had not provided Allcar with an opportunity to be heard on the question of whether its claims in the proceeding should be dismissed - there had therefore been a denial of procedural fairness - further, unlike superior courts, the powers of the Magistrates' Court are confined to those powers conferred by statute - the rules of court did not contemplate an order for summary judgment on the court's own motion, which was, in effect, what had happened here - the Magistrate had discretion to dismiss the proceedings on his own motion under s63 of the *Civil Procedure Act 2010* (Vic) - however, that discretion is not at large, and is conditioned by the requirement in s63 that the court be 'satisfied' of certain matters, and by the principles laid down by the authorities that the chance of success must be 'fanciful' - it had not been open to the Magistrate to be satisfied that Allcar's claims in the proceeding had no real prospects of success, even on the basis of the rather inadequate evidence before him for the purposes of the default judgment application - further, the Magistrate was obliged to provide Allcar with an opportunity to be heard on that question, which he did not do - the discretion under s63 was not enlivened, but even if it were, the exercise of discretion miscarried - appeal allowed.
A. Atanasov Nominees Pty Ltd (I B)

Shearer v Super Start Batteries Pty Ltd [2024] QCA 199
Court of Appeal of Queensland
Mullins P, Boddice JA, & Crowley
Misleading or deceptive conduct - SSB imports batteries and related products and sells them throughout Australia through a related company, TBSA - after discussions with a employee of TBSA who was also a sales representative of SSB (Kumar), the Shearers decided to go into the retail battery business, selling products supplied by SSB - they opened two stores, with the assistance of Kumar, who also did hands on work in the stores - the parties fell into dispute - the Shearers closed their stores and sold their business - SSB sued them for unpaid amounts for batteries supplied under a credit agreement - the Shearers counterclaimed for misleading or deceptive conduct by Kumar - the primary judge found for SSM on its claim and dismissed the Shearers' counterclaim - the Shearers appealed - held: although the Court's duty is to conduct a "real review" of the trial evidence, an appellant is nonetheless obliged to identify asserted errors with brevity, clarity, and precision - there was no that Kumar, acting on behalf of SSB and TBSA, had made the alleged representations, but the primary judge had found that they were not misleading or deceptive, and that there was no causation between them and the alleged

damage, and that the Shearers had not proven the alleged damage - the primary judge had not erred in finding that the representations were not misleading or deceptive - the trial judge's findings and conclusions were clearly open and supported by the evidence - there was no satisfactory evidence as to any improper use of the Shearer's systems by Kumar - the trial judge's conclusions on causation were also entirely consistent with the evidence - the trial judge also had not erred in finding that the Shearers had failed to substantiate the damage and loss they claimed - the trial judge had also correctly rejected the Shearer's defences on the basis of unfair contract terms and the *Sale of Goods Act 1896* (Qld) - appeal dismissed.
Shearer (I B)

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