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Executive Summary (One Minute Read)

Hallett Concrete Pty Ltd v Adelaide Brighton Cement Ltd & Ors (SASCA) - plaintiff in concrete supply case where trial was about to commence was permitted to amend its pleading, based on fresh evidence it was permitted to lead on this issue

Hornsby Shire Council v Salman (NSWCA) - Council liable in negligence where a person had rolled her ankle stepping between a mulched area and a raised artificial surface area in a park

Shapkin v The University of Sydney (NSWCA) - leave refused to appeal against decision staying juridical review application where the applicant also had an appeal on foot concerning the same subject matter

Corporate Documentation Management Pty Ltd (in Liquidation) v Bagshaw (NSWSC) - Court gave judgment against a financial administrator who had misappropriated funds

Westpac Banking Corporation v Sentox Pty Ltd (No 2) (NSWSC) - guarantor of a bank facility was liable in the tort of deceit for a fraud against the bank and the guarantee would not have been set aside under the *Contracts Review Act 1980* (NSW) in any event

Makland Constructions Pty Ltd v Page Steel Fabrications Pty Ltd (VSCA) - steel supplier had not repudiated contract where it had been prevented from performing under the contract by the other party, and was no longer putting an unjustified condition on its performance at the time of alleged repudation

Summaries With Link (Five Minute Read)

Hallett Concrete Pty Ltd v Adelaide Brighton Cement Ltd & Ors [2024] SASCA 80
Court of Appeal of South Australia
Livesey CJ, Doyle, & Bleby JJA
Pleadings - Hallett sought leave from a refusal of leave to amend its pleading to introduce allegations of breach of contract arising from supplies of cement made by Adelaide Brighton to Boral, pursuant to a swap arrangement - Hallett also filed an interlocutory application to adduce fresh evidence obtained from Adelaide Brighton that supported its claim that there was a swap arrangement between Adelaide Brighton and Boral, in breach of the agreement between Hallett and Adelaide Brighton - held: the fresh evidence was capable of supporting an inference that there was a swap arrangement between Adelaide Brighton and Boral at the relevant time - the Court should not engage in fact-finding at this stage to determine the meaning and effect of the relevant documents, as that would be a matter for trial - sometimes it might appropriate, if not preferable, for the issue of leave concerning a revised plea based on newly discovered documents to be remitted to the primary judge - however, iIn this case, the imminent trial date and the preparations being made for trial combined to support the conclusion that the Court should address the issue, both for practical reasons and because the questions of leave to appeal and leave to amend were so closely connected - it was therefore strictly unnecessary to determine whether the primary judge was correct to find that the earlier proposed pleading comprised an abuse of process because the foundation for the claim was speculative - it is generally desirable that the Court facilitate the litigation of all disputes between the parties, ensuring efficiency in the conduct of litigation, so as to avoid a multiplicity of proceedings - were the amendment to be disallowed and new proceedings commenced, there would be some scope for dispute about the operation of *Anshun* estoppel - based on the fresh evidence, the appeal should be allowed, and leave to amend granted.
Hallett Concrete Pty Ltd

Hornsby Shire Council v Salman [2024] NSWCA 155
Court of Appeal of New South Wales
White & Adamson JJA, & Basten AJA
Negligence - the respondent rolled her ankle when stepping from an area covered by mulch to a blue when pour surface in a public park under the control of Council - she sued Council in negligence - the primary judge upheld her claim, found contributory negligence of 15%, and awarded about $280,000 in damages - Council appealed - held (by majority, Basten AJA dissenting): the primary judge did not err in identifying the risk of harm as the risk of someone, in the course of walking between the mulch/bark surfaced area and the artificial ('spongy') surface area in the playground, falling and sustaining injury - Council should not be permitted to put a new case at trial that the true risk was the risk associated with the slope - Council should also not be permitted to depart from its position at trial by now arguing that the primary judge erred by applying Australian Standards regarding playgrounds - the Court should not interfere with the findings of the primary judge that the height difference between the two surfaces was

not readily discernible to persons walking across the mulch area to the spongy area or vice versa - the primary judge had not erred in failing to find that the risk was obvious - whether a risk is obvious is an assessment which must be made in all the circumstances - that a risk may be discernible, does not make it readily discernible, much less obvious, since the surrounding circumstances must be taken into account - it is not enough to conclude that a hazard would be obvious to someone paying close attention - the primary judge had not erred regarding causation - the trial judge had not erred in failing to find that a reasonable person in the Council's position would have considered the risk of harm did not require a response - Council had not acted on the advice contained in reports it had received, and had not explained why it had not - it had been open to the primary judge to accept that the precautions proposed were, at least with respect to cost, reasonable - appeal dismissed.
View Decision

Shapkin v The University of Sydney [2024] NSWCA 156
Court of Appeal of New South Wales
Meagher JA & Griffiths AJA
Appeals - the applicant had been a student in the LLM program at the University of Sydney, with an agreement with the University for student accommodation - the University intended to evict him, and he commenced proceedings in the NSW Civil and Administrative Tribunal seeking a declaration that his accommodation agreement was subject to the provisions of the *Residential Tenancies Act 2010* (NSW) - the Tribunal found that the Act did not apply because the accommodation agreement was one pursuant to which a person "lodges" with another person, and because the because the premises were a "hall of residence" within the meaning of r31 of the *Residential Tenancies Regulation 2019* (NSW) - an Appeal Panel refused leave to appeal on a question of law, finding the Tribunal had not erred and the applicant had not established any of the matters allowing a grant of leave - the applicant filed an application for leave to appeal to the Supreme Court on questions of law against the Appeal Panel's decision - he separated filed a summons seeking judicial review in the Supreme Court - the Court ordered the two proceedings run together - after hearing, the primary judge reserved judgment in the appeal proceedings, and delivered *ex tempore* judgment staying the judicial review proceedings pursuant to s34(1)(c) of the *Civil and Administrative Tribunal Act 2013* (NSW), which provides that the Supreme Court may refuse to conduct a judicial review if an appeal to a court could be, or has been, lodged against the decision - the applicant sought leave to appeal - held: generally, the Court will only grant leave to appeal where the proposed appeal raises an issue of principle, a question of public importance, or seeks to address a reasonably clear injustice arising from a misapprehension of fact or law which goes beyond something that is merely arguable - the proposed appeal grounds did not raise any issue of principle or question of public importance - no *House v The King* error had been shown in the primary judge's discretionary decision under s34(1)(c) - this decision was supported by authority - the applicant's complaint of procedural unfairness relating to the s34(1)(c) issue is also without sufficient merit given the way he had argued this issue at trial - leave to appeal refused.
View Decision

Corporate Documentation Management Pty Ltd (in Liquidation) v Bagshaw [2024] NSWSC 787
Supreme Court of New South Wales
Lindsay J
Fiduciary duties - a printing company engaged a financial administrator who misappropriated funds - the printing company commenced proceedings seeking compensation - the financial administrator said that the contract for her services was between the printing company and her own company, which was also a defendant in the proceedings - the parties disagreed as to the issues in the proceedings - held: the defendants' criticism of the plaintiffs' case as conceptually flawed was itself misconceived - the nature of the "wrongdoing" alleged against the financial administrator started with unauthorised transfers totalling about $10million and then allowed credits in her favour for consultancy fees and payments on the printing company's account - the defendants could not reasonably have been misled regarding the nature of the case - the systemic nature of the financial administrator's conduct in interposing herself between the printing company and its creditors, coupled with her creation and concealment of false records and a complex audit trail covering her tracks, told against characterisation of her conduct as a mistake or innocent and warranted characterisation of her conduct, at least, as unconscionable, justifying the grant of a curial remedy - the printing company having proved misappropriation was not obliged to embark on a full accounting in circumstances in which the onus was on the defendants to explain, or to submit to remedial orders in respect of, any gap between misappropriation and restitution.
View Decision

Westpac Banking Corporation v Sentox Pty Ltd (No 2) [2024] NSWSC 783
Supreme Court of New South Wales
Ball J
Contracts - a fruit and vegetable wholesaling company was under the control of a husband, although his wife was formally the director and the husband was neither a director nor shareholder - a bank provided an invoice discounting facility to the company, guaranteed by the wife - the bank later alleged the company had submitted false invoices - the bank claimed under the facility against the company and the wife as guarantor, claimed against the husband, wife, and an employee of the company under the tort of deceit, alleged that certain assets were held on constructive trust for it, and claimed equitable compensation from a recipient of the funds - the wife said the guarantee should be set aside under the *Contracts Review Act 1980* (NSW) - held: the wife had been aware of the fraud, and was liable in the tort of deceit - the wife's evidence suggested the guarantee was unjust because she was pressured into signing it and she was not aware that she was giving a guarantee - that claim failed a the factual level - the cross-claim based on the *Contracts Review Act* would therefore fail even if the allegations of fraud against the wife were not made out - the bank was entitled to assert a charge over certain properties - the employee was also liable in the tort of deceit as she knew that details she entered were incorrect.

View Decision

Makland Constructions Pty Ltd v Page Steel Fabrications Pty Ltd [2024] VSCA 142
Court of Appeal of Victoria
Beach, Kennedy, & Lyons JJ
Construction contracts - Makland and Page Steel contracted for Page Steel to supply and erect steel framework for two warehouses, including offices and canopies - in due course, Makland and the site owners sued Page Steel seeking damages for alleged repudiation of the contract, said to be constituted by Page Steel's refusal to deliver steel for the canopies until such time as Makland provided a deed of release - the primary judge found that Page Steel had not repudiated the agreement - Makland and the site owners appealed - held: the test for repudiation is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it - repudiation is not ascertained by an inquiry into the subjective state of the mind of the party in default - the whole circumstances of the case must be examined - in some circumstance, mere honest misapprehension, especially if open to correction, will not justify a charge of repudiation - the primary judge had not erred in finding that Page Steel was prevented from performing the contract by Makland seeking performance other than in accordance with the contract by seeking to use its own riggers and ordering Page Steel's employees and contractors off the site, and that, by the relevant time, Page Steel was no longer pressing for a release as a condition of supplying the canopies - appeal dismissed.
Makland Constructions Pty Ltd

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