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Executive Summary (One Minute Read)

Do v Kolsumdet Pty Ltd (FCA) - trial judge in defamation proceedings declined to recuse himself after making comments in directions hearing about the desirability of mediation and the potential costs consequences of the applicant failing to be awarded substantial damages

One T Development Pty Ltd v Peter Krejci in his capacity as liquidator of ENA Development Pty Ltd (NSWCA) - liquidator was justified in treating property as beneficially owned by the company, despite other proceedings on foot to determine the beneficial ownership of that property

Jackson v Cheek (VSC) - covenant not to sue in settlement of proceedings prevented the defendant from then suing its advisors in respect of the transactions that had led to those proceedings

Callisi Pty Ltd v Sterling & Freeman Advisory Pty Ltd (VSC) - claim for equitable marshalling by apportionment succeeded where a first mortgagee over two properties had elected to exercise its security rights in an order that disadvantaged the second mortgagee of one of the properties

Elly Property Wright Residential Pty Ltd v Elliott (ACTSC) - solicitors had not been authorised to bind their clients to an agreement for rescission of a contract for the sale of real property, and a binding agreement had not been reached in any event

Summaries With Link (Five Minute Read)

Do v Kolsumdet Pty Ltd [2023] FCA 592
Federal Court of Australia
Bromwich J
Defamation - applicants (described as "media influencers or bloggers") sued a restaurant operator for social media posts critical of their behaviour in the restaurant - during a directions hearing, the trial judge raised issues of transfer to the Federal Circuit and Family Court and mediation - at a further directions hearing the judge reiterated his previous comments and said he would need some persuading that the matter was suitable for the Federal Court and that, if the case had been brought in the state courts, it would have been in the District Court rather than the Supreme Court - counsel for the applicants said it would be a shame if the Federal Court were turned into a celebrity court, and the judge responded that it would be a shame if the Federal Court were turned into a neighbourhood disputes court, and that the present matter was somewhere between the two, but more at the neighbourhood dispute end of the spectrum - at a third directions hearing the judge stated that he had an issue with defamation cases generally that, unless they involved a huge amount of damages, a lot of them ended up being litigation over costs - the judge made a number of further comments, in the context of suggesting mediation, that he would be astonished if the applicants were going to get any substantial amount of damages, although he also expressly said he was always open to being astonished and that no view formed at this "umbrella level" was reflective of what would necessarily happen - the applicants later applied for the judge to recuse himself for apprehended bias, contending that a fair minded observer would understand that the judge had taken the view that the applicants' claim was minor, that the judge would be astounded if the applicants were to be awarded a substantial sum, and that there were costs consequences of proceeding in the Federal Court and not obtaining a significant amount - held: the real substance of the application was that a fair-minded observer would reasonably come to the view that the judge held a state of mind that was not open to persuasion that the applicants' claim was significant - the applicants' case did not rise above assertion that the judge was incapable of altering the preliminary conclusions he had expressed - the fundamental problem for the application was that it did not properly entail any sufficient identification of any factor within the preliminary views expressed in the context of encouraging further mediation attempts which might lead the judge to resolve the issues at trial other than on their legal and factual merits - a fair-minded lay observer, either listening to the case management hearings, or reading the transcripts as a whole, would understand that the judge was saying no more than that, because this proceeding was not at the higher end of seriousness when it comes to defamation, there was a real risk of costs greatly exceeding any likely damages being awarded, even if the case were wholly successful, and therefore that a further attempt at mediation would be worth considering - application for recusal refused.
Do

One T Development Pty Ltd v Peter Krejci in his capacity as liquidator of ENA

Development Pty Ltd [2023] NSWCA 120
Court of Appeal of New South Wales
Ward P, Leeming, & Mitchelmore JJA
Insolvency - ENA Development Pty Ltd was in liquidation - there was evidence it had been the trustee of two trusts - One T Development Pty Ltd, a company under the control of those who formerly controlled ENA, now claimed to be the trustee of those trusts - there was pending litigation regarding the beneficial ownership of land at Homebush, and ASX-listed shares that were in ENA's name - One T claimed this property was the property of a trust of which it was now the trustee - there were deeds of trust and minutes of meetings which suggested ENA held that property on trust - however, there were circumstances suggesting those documents did not reflect the true position - ENA's liquidator obtained directions from the Supreme Court following a contested hearing that the liquidator would be justified in treating that property, and also monies in a bank account maintained by ENA, as property to which ENA was absolutely entitled - One T was granted leave to appeal - the primary ground of appeal was that the primary judge erred because (i) the beneficial interest in the property was seriously in issue; (ii) any transfer of the property to a third party may be irremediable; (iii) there was evidence that the beneficial interest in the said property resided other than in ENA; and (iv) the Court was not being requested to make a binding determination as to the beneficial ownership of the property - further grounds of appeal were that the primary judge failed to have regard to certain evidence, and that the primary judge used evidence contrary to a ruling that evidence was admitted on a limited basis - held: the primary judge had not made a finding that documents had been brought into existence to support a claim that some of ENA's property was held on trust - the Court of Appeal also declined to express a view on this question - the orders under appeal did not determine any title to property - those orders merely confirmed that, in advance of a determination of beneficial title to the property in ENA's name, the liquidator would be justified in proceeding on the basis that the property was owned beneficially by ENA and was available for the benefit of creditors - the orders provide qualified comfort to the liquidator in the event that it turned out that he was wrong to proceed on the basis that the property was beneficially by ENA - the orders had only two consequences for One T: (1) they tended to stand in the way of any interlocutory relief restraining a sale or dealing with the property by the liquidator, and (2) they tended to prevent any costs order being sought personally against the liquidator if it turned out the property was not beneficially owned by ENA - there was nothing wrong, and certainly no appellable error in the exercise of a discretion, in the primary judge giving the directions under appeal - the other grounds of appeal were also not made out - appeal dismissed.
View Decision

Jackson v Cheek [2023] VSC 298
Supreme Court of Victoria
M Osborne J
Contract - Jackson allowed a company to buy back its shares - the company was then sold to a purchaser - Jackson sued the company, the other former shareholders, and the purchaser in the Supreme Court of Victoria - Jackson alleged he had been induced to allow the buyback of

his shares by false representations by the other former shareholders that the company was experiencing serious financial difficulty, and by their failure to disclose that the purchaser had expressed interest in buying the company - the proceedings settled with substantial payments being made to Jackson - the terms of settlement also included releases and a covenant not to sue that provided that the parties "hereby severally covenant not to sue any other person in respect of the matters the subject of the Proceeding or the Cross-Claim" - the other former shareholders then sued their advisors in the Federal Court for negligent advice and misleading or deceptive conduct in advising on the share transactions - the advisors' solicitors wrote to Jackson, informing him of the existence of the new proceedings, and stating that he would likely be required to give evidence - Jackson sued again in the Supreme Court, contending that the bringing of the new proceedings infringed the covenant not to sue - held: the process of construction of the covenant was to be approached by determining what a reasonable business person would have understood the terms "any other person" and "in respect of" to mean, and this required consideration of the language used by the parties, the surrounding circumstances known to them, and the commercial purpose or objects to be secured by the contract - the words "any other person" were clear and unambiguous, and had an ordinary and natural meaning, and *prima facie* should be given that ordinary and natural meaning - the terms of settlement disclosed an objective intention to differentiate between parties and persons - the defendants' submission that the words "any other person" should be confined to accessories or related entities of parties was rejected - there was nothing absurd or repugnant about the words "any other person" being given their ordinary and natural meaning - as to the words "in respect of", a comparison of the pleadings made it clear that there was a connection or relationship between the subject matter of the settled proceedings and the allegations made in the new proceedings - the new proceedings were therefore "in respect of" the matters the that were the subject of the settled proceedings - Jackson was entitled to an injunction restraining the carrying on of the new proceedings - parties to be heard on the precise form of orders.
Jackson

Callisi Pty Ltd v Sterling & Freeman Advisory Pty Ltd [2023] VSC 300
Supreme Court of Victoria
M Osborne J
Marshalling by apportionment - Sterling held a first mortgage over two properties, at Toorak and St Kilda Road, securing the same debt - Sterling also held a second ranking mortgagee over the St Kilda Road property, securing a different debt - Callisi held a second ranking mortgage over the Toorak property and a third mortgage over the St Kilda Road property - Sterling exercised its security rights under the first mortgage over the Toorak property and recovered its first debt from the proceeds of sale - Sterling then wrote off the balance of that debt and discharged its first mortgage over the St Kilda Road mortgage - Callisi's second ranking mortgage over the Toorak property was rendered valueless as a result - the St Kilda Road property was also sold, and Sterling recovered its second debt from the proceeds of sale - Sterling's choice to exercise its first mortgage rights over the Toorak property rather than the St Kilda Road property had therefore worked to the disadvantage of Callisi and to the advantage of Sterling - Callisi sued,

contending that, pursuant to the equitable doctrine of marshalling by apportionment, Sterling's first debt had to be apportioned over the Toorak and St Kilda Road properties in proportion to their respective values, with the competing equities of Callisi as the second mortgagee over the Toorak property and Sterling as the second mortgagee over the St Kilda Road property adjusted accordingly - held: Sterling's argument that Callisi's interest in the St Kilda Road property by way of its third ranking security acted as a bar to any relief was incorrect and based on a misreading of authority - the asserted limitation of marshalling in its strict sense as being confined to a single claimant did not mean that marshalling by apportionment cannot be invoked at the instance of a party in Callisi's position - apportionment operates to ameliorate the risk of prejudice to subordinate security holders with equal ranking securities as a result of the order in which the primary security holder chooses to realise the securities - what is critical is that there are two creditors with equal ranking securities, each of whom stands to be affected by the decision as to the order of sale chosen by the primary security holder - it is the effect on these equal ranking securities which enlivens the relevant equity, which is relevantly unaffected by other securities that one or more might hold - Sterling's argument that, because the first mortgage over the St Kilda Road Property had been discharged, there was no mortgage over the St Kilda Road Property to which Callisi could be subrogated, must also be rejected - the references to "subrogation" in the authorities merely describe the effect of the relief to which the second mortgagee is entitled, rather than a firm requirement that there be a subsisting encumbrance into which the second mortgagee can step - Callisi's claim succeeded - the sum required to satisfy the first debt of $3,298,039 was therefore apportioned rateably between the Toorak and St Kilda Road properties by reference to their respective values of $3,250,000 and $1,180,000 (73.36% to 26.64%), and 26.64% of the first debt was deemed to have been recovered from the sale of the St Kilda Road property, which would mean that $878,597.59 remained available to Callisi as second mortgagee of the Toorak property and only $301,402.41 remained available to Sterling as second mortgagee of the St Kilda Road property - parties to be heard on the precise form of orders.
Callisi Pty Ltd

Elly Property Wright Residential Pty Ltd v Elliott [2023] ACTSC 138
Supreme Court of the Australian Capital Territory
Curtin AJ
Contract - the Elliots as purchasers and Elly as vendor entered into a written contract for the sale of an off-the-plan property in a proposed development - Elly's solicitor sent a letter to the Elliott's solicitor expressing a proposal to rescind the contract pursuant to s19C of the *Civil Law (Sale of Residential Property) Act 2003* (ACT) - Elly's solicitor then wrote to the Elliott's solicitor, making an offer of a payment of $30,000 for consent to rescind the contract - the Elliott's solicitor rejected this offer, and made a counteroffer of $47,500 plus return of the deposit - there were then three telephone conversations between Elly's barrister and the Elliott's solicitor, and the exchange of several emails between the solicitors - Elly later sued, contending that a binding oral agreement for consent to rescind had been reached in the telephone conversations - held: it was important to note the distinction between instructions a client may give to a solicitor

and the authority (if any) a client may give to a solicitor to bind the client to contractual obligations - it is well recognised that a solicitor has implied and ostensible authority to bind a client to a settlement of proceedings - however, this is not the case in purely commercial transactions - the Elliott's solicitor had at least ostensible authority to negotiate the terms of any agreement with the plaintiff's legal representatives, and did so negotiate - however, the question of that solicitor's authority to bind the Elliotts to an agreement was a different matter - there was no evidence given by the Elliotts as to what authority, if any, they gave the solicitor to bind them to any agreement - there must be clear and cogent evidence of authority to bind - there was no clear and cogent evidence in this case - in case it was wrong in reaching this conclusion, the Court proceeded to analyse whether an agreement had in fact been reached - reasonable people in the position of Elly and the Elliotts would not have thought that an immediately binding agreement had been made at the relevant time - mutual assent to all significant terms had not been communicated and a reasonable person in the position of the parties would have thought that there would not be a binding agreement unless and until a written document was executed - there was therefore no binding agreement in any event - application dismissed.
Elly Property Wright Residential Pty Ltd

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