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Benchmark

Friday, 12 July 2024

Weekly Banking Law Review

Selected from our Daily Bulletins covering Banking

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Executive Summary (One Minute Read)

Malayan Banking Berhad v Vietnam Industrial Investments Ltd (NSWSC) - Court made a gross sum order on an indemnity basis after a successful application to wind a company up in insolvency

Ayshan v Abualadas (No 2) (NSWSC) - Court determined wording of declaration of constructive trust for sale

Re Emerging Energy Solutions Group Pty Ltd (No 2) (VSC) - application to set aside statutory demand failed as the Court concluded the amount claimed was a debt and not merely a claim for unliquidated damages

HABEAS CANEM

The scent on the breeze

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Summaries With Link (Five Minute Read)

Malayan Banking Berhad v Vietnam Industrial Investments Ltd [2024] NSWSC 830
Supreme Court of New South Wales
McGrath J
Gross sum costs orders - the Court had previously ordered that Vietnam Industrial Investments Ltdbe wound up in insolvency on the application of Malayan Banking Berhad, and that liquidators be appointed - Malayan Banking now applied pursuant to liberty previously granted that the liquidators reimburse it out of the assets of Vietnam Industrial Investments for the costs of the application on an indemnity basis by way of a gross sum order - the liquidators neither consented nor opposed the application - held: the power conferred by s98(4) of the *Civil Procedure Act 2005* (NSW) to make a gross sum costs order is not confined, and may be exercised whenever the circumstances warrant, and it may appropriately be exercised where the assessment of costs would be protracted and expensive, and in particular if it appears that the party obliged to pay the costs would not be able to meet a liability of the order likely to result from the assessment - the Court must be confident that the approach taken to estimate costs is logical, fair and reasonable - a gross sum assessment, by its very nature, does not envisage that a process similar to that involved in a traditional taxation or assessment of costs should take place, and the amount may be fixed broadly - nevertheless the power to award a gross sum must be exercised judicially, and after giving the parties an adequate opportunity to make submissions - because Vietnam Industrial had been wound up in insolvency it was appropriate to order costs as a gross sum rather than as assessed costs - the costs application was supported by an affidavit of a solicitor admitted to practice in the Court for 29 years and who had practised solely in the area of legal costing for 22 years - significant weight in the exercise of the Court's discretion should be placed on Malayan Banking's contractual entitlement to the payment of its costs on an indemnity basis - it had been unreasonable in the sense described in the authorities for Vietnam Industrial to oppose the winding up application by seeking to delay the hearing, where it had no evidence capable of rebutting the presumption of insolvency, by reference to a speculative restructuring - gross sum of about $266,000 awarded on an indemnity basis.
View Decision
[From Benchmark Wednesday, 10 July 2024]

Ayshan v Abualadas (No 2) [2024] NSWSC 824
Supreme Court of New South Wales
Parker J
Constructive trusts - two couples (being two sisters and their respective spouses) were engaged in the purchase and development of a property which involved construction of a duplex building and the subdivision of the property into two lots, one containing each duplex - one sister separated from her spouse and a dispute arose with the two sisters and the remaining spouse on one side, and the separated spouse on the other side - the couple that remained together and the separated sister sought orders compelling the separated spouse to cooperate in

separating the parties' ownership and mortgage obligations between the two subdivided lots - the separated spouse resisted this and sought the appointment of a trustee for sale instead - the Court had held that the separated sister's claim for a common intention constructive trust failed, and her spouse's cross-claim for recognition of a failed joint endeavour constructive trust succeeded - the parties agreed that, given those conclusions, the Court should declare a constructive trust for sale over the properties in the hands of certain parties, coupled with an immediate order replacing them with an independent trustee to carry out the sale and divide the proceeds (see Benchmark 5 June 2024) - the Court now determined the form of final relief - held: the wording of the declaration of constructive trust for sale should be based on that proposed by Deane J in *Muschinksi v Dodds* (1985) 160 CLR 583, and must relevantly specify four elements: (1) the date from which the trust is to be imposed; (2) the use of the sale proceeds to repay debts secured on the property (and the expenses of sale and any other outstanding liabilities of the parties associated with the joint endeavour); (3) the repayment of the parties' contributions to the joint endeavour; and (4) payment of any surplus (after deduction of the trustee's expenses) to the parties to the joint endeavour in equal shares - as the parties had not addressed the proper date, the Court used the date of final orders - the existence of liabilities at law upon the breakdown of the joint endeavour was a reason for equitable intervention, not an obstacle to it - any liability for capital gains tax on the sale of the property must be seen as equivalent to a contribution to the joint endeavour, and should be discharged out of the sale proceeds - the bad blood between the parties required the appointment of an independent trustee to effect the sale and wind up the trust's affairs - equal division between couples ordered, and the Court did not consider it necessary to determine the rights *inter se* of each couple.
View Decision
[From Benchmark Friday, 12 July 2024]

Re Emerging Energy Solutions Group Pty Ltd (No 2) [2024] VSC 393
Supreme Court of Victoria
Barrett AsJ
Corporations law - the plaintiff and defendant entered into eight contracts for the forward sale of carbon credits issued under a NS trading scheme pursuant to the *Climate Change Response Act 2002* (NZ) - the plaintiff defaulted, and the defendant terminated the contracts, and claimed amounts due under the contracts in the event of termination - in due course, the defendant served a statutory demand for nearly AUD$25million - the plaintiff applied to set the statutory demand aside under s459G of the *Corporations Act 2001* (Cth), on the basis that the amounts claimed were not debts but rather claims for unliquidated damages, and therefore not properly the subject of a statutory demand - held: the only issue was the proper characterisation of the claim in the demand - a number of authorities that described the difference between a liquidated and unliquidated claim - the ordinary meaning of "liquidated damages" is a sum fixed by the parties to a contract as a genuine pre-estimate of damage in the event of breach, whether as a pre-determined lump sum, or by means of a specified calculation or scale of charges or other positive data - if the amount owing may only be determined by the Court assessing damages in

accordance with general principles, then the claim will not be a debt - however, if a liquidated sum may be determined by a mechanism set out in the contract, then the claim will properly be characterised as a debt if that mechanism is employed and the amount owing is determined - the Court was satisfied that the contract articulated a mechanism for determination of the amount owing, and that that mechanism had been employed, and the figure reached and stated in the statutory demand was a debt owing under the contract - proceedings dismissed.
Re Emerging Energy Solutions Group Pty Ltd (No 2)
[From Benchmark Wednesday, 10 July 2024]

Executive Summary and (One Minute Read)

Moody v Netchoice (SCOTUS) - Lower court decisions upholding State statutes prohibiting social media companies from moderating content posted by third parties were reversed for failure to conduct proper First Amendment analysis

Summaries With Link (Five Minute Read)

Moody v Netchoice 603 US ___ (2024)
Supreme Court of the United States
The States of Florida and Texas enacted legislation that prohibited internet platforms from moderating third-party content based on content. The Supreme Court found serious First Amendment implications that the lower courts failed to properly consider. The cases were remanded to the courts below. The Court cited to *Miami Herald Publishing Co v Tornillo*, 418 US 241 (1974), where it was held that a Florida statute requiring newspapers to offer a right of reply violated the First Amendment because it consisted of compelled speech. Compelled speech can violate the First Amendment as much as suppression of speech. The Court said that government cannot meddle in speech by claiming that it is improving the marketplace of ideas. Here, the Court concluded that states were not likely to succeed in prohibiting the platforms from enforcing the platforms' own content moderation rules. The Court said that the States' attempt to better balance the mix of viewpoints on the internet by restricting content moderation amounted to an interference with speech decisions made by the private platforms. The Court added that a State cannot prohibit speech to rebalance the speech market. Inasmuch as the content moderation practices amounted to speech decisions by the platforms, the government was not free to enact laws that infringed those private speech rights.
Moody

Poem for Friday

Iceland

By Jonas Hallgrimsson (1807-1845)

Charming and fair is the land,
and snow-white the peaks of the jokuls [glaciers],
Cloudless and blue is the sky,
the ocean is shimmering bright,
But high on the lave fields, where
still Osar river is flowing
Down into Almanna gorge,
Althing no longer is held,
Now Snorri's booth serves as a sheepfold,
the ling upon Logberg the sacred
Is blue with berries every year,
for children's and ravens' delight.
Oh, ye juvenile host
and full-grown manhood of Iceland!
Thus is our forefathers' fame
forgotten and dormant withal.

Jonas Hallgrimsson was born in Iceland on 16 November, 1807. He is a revered figure in Icelandic literature, writing in the Romantic style. His love of the Icelandic people and country side and pride in the national identity comes through his poetry. He was a promoter of the Icelandic Independence Movement. He was employed for a time by the sheriff of Reykjavik as a clerk. He studied law at the University of Copenhagen. He also worked as a defence lawyer. He founded the Icelandic periodical Fjolnir first published in 1835. He died on 26 May 1845, after slipping on stairs and breaking his leg, the previous day. He died of blood poisoning aged 37 years. His birthday each year is recognised as the Day of the Icelandic Language.

Ég bið að heilsa, words by Jónas Hallgrímsson, composition by Ingi T. Lárusson
https://www.youtube.com/watch?v=6OqbfGSJDUc

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