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Benchmark

Friday, 15 March 2024

Weekly Banking Law Review

Selected from our Daily Bulletins covering Banking

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Executive Summary (One Minute Read)

Redland City Council v Kozik (HCA) - Council was required to make restitution of an invalidly imposed levy, even that part of the levy that had already been spent on works allegedly for the benefit of the levy-payers

Burrows v The Ship 'Merlion' (FCA) - plaintiff had established Admiralty jurisdiction in most of the claims he sought to bring *in rem* against a ship

LPY Investments Pty Ltd v JY Property Pty Ltd & Anor (VSC) - caveat lodged by purported unitholder under unit trust removed, as unitholders did not have the requisite interest in the assets of the trust under the trust deed

V Quattro Pty Ltd v Townsville Pharmacy No 4 Pty Ltd (QCA) - exercise of call option was valid, even though the contractual premium had been paid after the contractually required time

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Summaries With Link (Five Minute Read)

Redland City Council v Kozik [2024] HCA 7
High Court of Australia
Gageler CJ, Gordon, Edelman, Steward, & Jagot JJ
Local government - a Council levied special charges on persons who owned land with water frontage - Council later became aware that the resolutions to levy the special charges were invalid - Council refunded the unspent portion of the special charges, but refused to refund the remainder on the basis that it had been spent on works to the benefit of those who had paid - the respondents commenced a representative action seeking repayment of the remainder - a single judge of the Queensland Supreme Court held the respondents were entitled to recover the remainder as a debt under regulations under the *Local Government Act 2009* (Qld) - the majority of the Court of Appeal held that the respondents were not entitled to recover as a debt, but were entitled to recover as restitution on the ground of mistake of law - Council was granted special leave to appeal, and the respondents were granted special leave to cross-appeal against the finding they could not recover as a debt - held (by Gordon, Edelman, & Steward JJ; Gageler CJ and Jagot J agreeing for different reasons): on their proper construction, the regulations applied only where there was a valid resolution to levy the charges, but the charges were then incorrectly levied - the Court of Appeal had therefore been correct to find that the remainder was not recoverable as a debt - held further (by Gordon, Edelman, & Steward JJ; Gageler CJ and Jagot J dissenting): mistake of law gave the respondents a prima facie ground for restitution of the remainder of the levies - restitution would not cause any failure of the basis on which works had been performed by Council, as Council had been obliged to perform those works irrespective of the impugned levies - the respondents and other group members did not benefit from the works in the sense in which the concept of benefit operates in the law of unjust enrichment - to recognise a defence of good consideration based on a benefit to the respondents would stultify the operation of the *Local Government Act* - Council therefore had no defence of good consideration - it was unnecessary to consider whether Australian law should recognise the Woolwich principle, set out by Lord Goff in *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70, that money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority is prima facie recoverable by the citizen as of right" - no separate defence of "Recipient Not Unjustly Enriched" as set out in §62 of the US *Restatement (Third) Restitution and Unjust Enrichment* should be recognised in Australian law - "unjust enrichment" is a conclusion of a process of reasoning, not a premise that is capable of direct application - it would also be too large a step to recognise, without argument and without evidence, an extended defence of change of position and fiscal chaos applying only to taxing authorities - Council was liable to make restitution - Gageler CJ and Jagot, in dissent, were of the opinion that Council had not been unjustly enriched when viewed in the context of the statutory obligations and entitlements of Council and the respondents under the scheme of the *Local Government Act* and the *Coastal Protection and Management Act 1995* (Qld) - appeal and cross-appeal both dismissed.
Redland City Council

[From Benchmark Thursday, 14 March 2024]

Burrows v The Ship 'Merlion' [2024] FCA 220
Federal Court of Australia
Sarah C Derrington J
Admiralty law - the plaintiff claimed to be the owner of a ship, The Merlion, which he contracted to trade-in for a new vessel to be built by PMY - after taking possession of The Merlion, PMY went into liquidation - the plaintiff terminated the contract - the sole director of PMY purported to transfer ownership in The Merlion to Thurlow, who kept it moored at his private jetty - the plaintiff commenced proceedings *in rem* against The Merlion, seeking a declaration that he was the sole beneficial owner, an injunction requiring Thurlow to give possession or transfer title, and damages for conversion, detinue, and under the *Australian Consumer Law* - the plaintiff asserted Admiralty jurisdiction in that each of his claims was a proprietary maritime claim concerning a ship that founded an action *in rem* under s16 of the *Admiralty Act 1988* (Cth) - the Admiralty Marshal arrested The Merlion pursuant to an arrest warrant taken out by the plaintiff - Thurlow contested jurisdiction and also sought summary dismissal even if jurisdiction were established - held: a "proprietary maritime claim" is defined by s4(2) of the *Admiralty Act* - such jurisdiction does not depend on any factual precondition, but rather on the claim having the legal character of a claim relating to possession of or title to, or ownership of, a ship - claims that The Merlion was held on trust, for knowing receipt under *Barnes v Addy*, and for an alleged sham, were proprietary maritime claims - claim under the *Australian Consumer Law*, based on a series of alleged misleading or deceptive pre-contractual and contractual representations in respect of PMY's capacity, was not a proprietary maritime claim, and should be struck out as impermissibly commenced in the same proceedings as the *in rem* claims, contrary to r18 of the *Admiralty Rules* - the plaintiff had a reasonable prospect of establishing the trust claim, the *Barnes v Addy* claim, and liability in conversion or detinue - he had no reasonable prospect of establishing the sham claim, which should be struck out - the prayer that the Admiralty Marshal provide the plaintiff with possession was entirely misconceived, as the Merlion was not in the Marshal's possession, but was rather in the Marshal's custody, and possession remained with whoever was lawfully entitled to it - further the plaintiff had had The Merlion arrested and had caused her to be in the Marshal's custody, and, should he wish The Merlion to be released from arrest, the relevant procedure was provided for in the *Admiralty Rules*.
Burrows
[From Benchmark Friday, 15 March 2024]

LPY Investments Pty Ltd v JY Property Pty Ltd & Anor [2024] VSC 94
Supreme Court of Victoria
Cosgrave J
Caveats - a husband and wife and their respective companies were involved in substantial contested litigation in the Federal Circuit and Family Court - the wife's company owned a number of properties as trustee of a hybrid unit trust, and the wife claimed to be the only unitholder - the husband claimed the wife's company was a special purpose vehicle established

to buy and develop land, and he had been a director of that company from 2010 to 2023, and that his company was still a unitholder of the unit trust - the husband's company lodged caveats over the properties - the wife's company applied for a caveat to be removed, pursuant to s90(3) of the *Transfer of Land Act 1958* (Vic) - held: caveats under the Torrens system are treated as analogous to applications for interlocutory injunctive, and, when application is made for their removal, the the onus falls on the caveator to satisfy the two-stage test of reasonable issue to be tried and balance of convenience - the caveator must establish an interest in the actual land the subject of the caveat, not merely that the caveator has rights (whether contractual, equitable, or statutory) against the caveatee - one must not simply rely upon labels such as "unit trust" or "discretionary trust" in determining whether a beneficiary has an interest in the assets of the trust, but rather one must carefully examine the terms of the trust deed to establish the specific rights and entitlements granted - having regard to: the limited interest of a unitholder under the trust deed in this case, the breadth of the trustee's discretionary powers, the inability of a unitholder to legally compel the trustee to act in any particular manner, the absence of a term that a beneficial interest in the assets of the trust vested in the unitholders, and that each unit entitled the registered holder, together with the registered holders of the other units, to the beneficial interest in the trust fund as an entirety but that no unit holder had any entitlement to any particular security or investment or any part thereof, the Court found that the husband's company did not have a sufficient interest in the properties to support a caveat - even if the caveator ultimately proved the claimed rights, the case was sufficiently weak that the balance of convenience was against retention of the caveat until trial in any event - the caveat unduly limited the exercise of the trustee's powers and, quite possibly, was lodged for an inappropriate purpose - caveat withdrawn.
LPY Investments Pty Ltd
[From Benchmark Monday, 11 March 2024]

V Quattro Pty Ltd v Townsville Pharmacy No 4 Pty Ltd [2024] QCA 34
Court of Appeal of Queensland
Mullins P, Bond JA, & Kelly J
Contracts - the appellant granted the respondent a written call option to purchase a pharmacy business - the call option agreement had recited that the grantor granted the option to the grantee in consideration of receiving the premium (defined as $10), and had provided that the grantee must pay the premium to the grantor within 2 business days of the date of the agreement - the grantee did not pay the premium within the required time period, and only paid it to the grantor about two years later, shortly before it purported to exercise the call option - the primary judge declared that the respondent had validly exercised the option - the appellant appealed - held: the call option agreement had to be construed according to the objective theory of contract - there was nothing in the language used by the parties which suggested that, despite the fact of the parties having executed a formal written contract, they intended that no contract would become binding between them until one of them had taken a particular specified step at some later date - it is not uncommon for contracts to have been executed after the date they bear, and the usual assessment of the parties' intention in such circumstances is that they

should be regarded as having impliedly agreed that the contract when ultimately executed would operate retrospectively to have governed their relationship from the date which the contract bears - the agreement should be construed as reflecting an intention to be presently bound because the grantee had promised to pay the premium - the grant of the option was in consideration of the promise to pay the premium, not the payment of the premium - the appellant had not demonstrated that the contractual requirement for payment of the premium within the stipulated time limit was essential either to the enforceability of the call option agreement as a contract or to the valid lawful and effective exercise of the option to purchase - appeal dismissed.

V Quattro Pty Ltd

[From Benchmark Thursday, 14 March 2024]

Executive Summary and (One Minute Read)

Smith v Fonterra Co-Operative Group Ltd et al (NZSC) - Supreme Court of New Zealand rejects attempt to strike out claim in tort relating to damage caused by climate change. Court affirms that principles of Maori customary law (tikanga Maori) inform the common law of New Zealand

Summaries With Link (Five Minute Read)

Smith v Fonterra Co-Operative Group Ltd et al [2024] NZSC 5
Supreme Court of New Zealand
Winkelmann CJ, Glazebrook, Ellen France, Williams, & Kos JJ
Mr Michael Smith as an elder and as a climate changes spokesperson for the Iwi Chairs Forum, a national forum of tribal leaders, brought suit against Fonterra and other large New Zealand corporations that were engaged in mining or manufacturing. Seeking an injunction, he raised three tort causes of action: public nuisance, negligence, and a new tort - damage to the climate system. All three counts were stricken by the Court of Appeal. In reversing this decision, the Supreme Court examined both climate change as well as legal remedies available in New Zealand. The Court was very clear that it was appropriate for the traditional or customary Maori law (tikanga Maori) to be considered in formulating the common law of New Zealand. The Court accepted as indisputable that climate change threatens human well-being and planetary health and that the evidence was unequivocal that humans had warmed the atmosphere principally through the emission of Green House Gasses (GHG). The Court also reviewed treaty obligations and New Zealand's comprehensive legislation - the *Climate Change Response Act 2002* (NZ) (CCRA). Mr Smith alleged that the defendants were responsible for more than one-third of New Zealand's GHG emissions. Mr Smith relied on the principles of tikanga Maori that establish various obligations and relationships with respect to land, the environment and that a breach creates a hara (issue) requiring utu (compensatory action) to restore ea (a state of harmony). The relief sought for all of the causes of action was an injunction requiring the defendants to reduce net emissions annually under supervision of the Court to achieve zero-net emissions by 2050. After rejecting the defendants' claim that the tort claims were excluded by the CCRA, the Court engaged in a comprehensive review of the law of nuisance as it developed in New Zealand, the UK, Canada, and the USA, and found that the claim had evolved with the passage of time. However, to maintain a claim, the plaintiff must establish that the harm was a reasonably foreseeable consequence of defendant's conduct, and that the defendant's act must unreasonably interfere with public rights. The Court held that the standard required to strike out a claim had not been met and that Mr Smith was entitled to bring his case to trial

where he would have an opportunity to present full evidence. As to claims arising from climate change, the Court found that these were in principle in accord with traditional nuisance cases where one party contaminated a water course to the detriment of the public and private parties. The Court said, 'climate change engages comparable complexities [of proof], albeit at a quantum leap scale enlargement'. As to liability of a single party where multiple parties contribute to the harm, the Court stated that it was no defence to creating a nuisance that others were engaged in the same conduct - it is unnecessary that the defendant be the sole polluter, only that the defendant was a significant cause of the harm - all questions of fact. Relying on Canadian and American decisions, the Supreme Court adopted the view that everyone who contributes to a nuisance is liable providing that in the aggregate a nuisance is proven. The Supreme Court reinstated all three claims for trial where questions include: (1) whether New Zealand's law of public nuisance should sanction GHG emissions - And (2) whether the actions of the corporate respondents amounted to a substantial and unreasonable interference with public rights? The Court added that the likely legal battleground would involve: causation, substantiality, unreasonableness, and remedy. With respect to the nuisance cause of action, the Court concluded that the principles governing public nuisance ought not to stand still in the face of massive environmental challenges attributable to human economic activity. The Common law, where it is not clearly excluded, responds to challenge and change in a considered way, through trials involving the testing of evidence. As the Court allowed the claim for nuisance to survive for trial, the Supreme Court declined to rule on the remaining claims for negligence and the proposed new climate change tort. The Court found that ruling on these claims was unnecessary because the same evidence supported all claims and that they all should go to trial where they could be fully developed. As to the effect of tikanga on the common law of tort, the Supreme Court rejected the Court of Appeal decision that the CCRA statutory scheme satisfied tikanga Maori. Instead, the Supreme Court held that the trial court must engage with tikanga because part of Mr Smith's loss is based on tikanga. The Court added that tikanga has been applied to common law tort actions since 1840. For example, the Court cited to a 2003 Court of Appeal decision affirming that Maori land rights derived from tikanga were cognisable at common law. The Court reiterated the continued vitality of tikanga in New Zealand: To summarise the essential conclusions reached, tikanga was the first law of New Zealand, and it will continue to influence New Zealand's distinctive common law as appropriate according to the case and to the extent appropriate in the case. Inasmuch as the plaintiff Mr Smith is acting not only in individual capacity but also on behalf of traditional entities, the Supreme Court held that the trial court must consider tikanga concepts of loss that are neither physical nor economic.
Smith

Poem for Friday

Near Avalon

By: William Morris (1834-1896)

A ship with shields before the sun,
Six maidens round the mast,
A red-gold crown on every one,
A green gown on the last.

The fluttering green banners there
Are wrought with ladies' heads most fair,
And a portraiture of Guenevere
The middle of each sail doth bear.

A ship with sails before the wind,
And round the helm six knights,
Their heaumes are on, whereby, half blind,
They pass by many sights.

The tatter'd scarlet banners there
Right soon will leave the spear-heads bare.
Those six knights sorrowfully bear
In all their heaumes some yellow hair.

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