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Benchmark

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Weekly Business Law

A Weekly Bulletin listing Decisions of Superior Courts of Australia covering Business Law

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Executive Summary (One Minute Read)

AIG Australia Ltd v Hanna (NSWCA) - insurer who had voided a policy on the basis of misinformation given by the insured after an accident was liable to indemnify the insured

Kane & Co (NSW) Pty Ltd v Idolbox Pty Ltd (NSWSC) - purchaser was not entitled to rescind contract for sale of a service station on the basis of an environmental report showing some contamination

In the matter of Riverina Solar Pty Ltd (NSWSC) - application to set aside statutory demand filed in Queensland and sent to NSW solicitors by email had not been validly served within the statutory time period

Trident Austwide Pty Ltd v Bagcorp Pty Ltd as trustee for the Rico Tea Trust (NSWSC) - a retiring minority partner was entitled to its aliquot share of the value of the business, including goodwill, without deduction on the basis of lack of control and lack of marketability of that share

Bajwa Group Pty Ltd v Sharma & Ors (VSC) - letter of offer signed by both parties did not constitute a binding contract for the sale of land, mostly because the identity of the party liable to pay the purchase price, and the capacity of that party to make the payment, was not known at the time the letter was signed

Nasseri v Wellington Builders Pty Ltd & Ors (VSC) - corporate trustee of unit trust controlled by the owner of land was, on a building contract's proper construction, a party to that contract, and was therefore liable under the *Building and Construction Industry Security of Payment Act 2002* (Vic)

Carter & Anor v Mackey Motels Pty Ltd (QCA) - tenant running a motel business had not been entitled to withhold payment of insurance premiums, and landlord's claim to recover the premiums it had paid succeeded

Munupi Wilderness Lodge Pty Ltd v Executive Director of Township Leasing (NTSC) - Local Court had not erred in ordering a tenant holding over under an expired lease granted an Aboriginal Land Trust to vacate

HABEAS CANEM

Panting pooches

Summaries With Link (Five Minute Read)

AIG Australia Ltd v Hanna [2024] NSWCA 91
Court of Appeal of New South Wales
Payne, Mitchelmore JJA, & Griffiths AJA
Insurance - a formworker on a construction project was injured when he slipped and fell from a height whilst walking on the scaffolding - he sued Hanna, the builder responsible for the project - Hanna was the named insured under an insurance policy in respect of the project - Hanna admitted to the insurer that, although he was the registered builder on the project, he was helping out a friend who had asked him to give his builder's licence number; and it was his friend who controlled everything on the site - the insurer voided the policy - Hanna cross-claimed against the insurer, seeking damages for an alleged wrongful termination of the policy, and also cross-claimed against the scaffolding company - at trial, Hanna testified that he was the builder in charge of the site, and he had deliberately not told the insurer the truth - the primary judge gave judgment by consent to the formworker, awarded judgement of $430,000 against Hanna, and dismissed the cross-claim against the scaffolding company - the primary judge then found that Hanna was the builder responsible for the project, the policy should have responded, the insurer had wrongfully terminated the policy, entry into the consent judgment activated the insuring claim in the policy, and had been reasonable - the insurer appealed - held: having regard to the manner in which the matter was run before the primary judge, and the prejudice that Hanna would suffer were the matter permitted to be run now, leave was refused to the insurer to argue on appeal that the primary judge erred in finding that the insurer had wrongfully repudiated the contract of insurance - the primary judge's construction of the insuring clause so that liability determined by a bona fide compromise agreement was within the scope of the indemnity accorded with authority - as to reasonableness, when understood as an inquiry into the reasonableness of the settlement, and not an inquiry into Hanna's liability per se, the primary judge's approach was consistent with authority - appeal dismissed.
View Decision
[From Benchmark Tuesday, 30 April 2024]

Kane & Co (NSW) Pty Ltd v Idolbox Pty Ltd [2024] NSWSC 410
Supreme Court of New South Wales
Parker J
Contracts - the purchaser under a contract for the sale of land containing a petrol station and an automotive repair workshop claimed to be entitled to terminate the contract under a special condition - the background to the special condition was a concern on the part of the purchaser that the land might be contaminated, having regard to its past and continuing use as a service station - the special condition provided for the parties to obtain an environmental report into the scope and nature of any contamination and that either party might rescind the contract pursuant to the standard recission clause (that is, with the deposit being refunded) if the environmental report indicated that the property did not fall within the NSW Environment Protection Authority Guidelines in relation to contamination levels in, on or under the property and which permitted

the property to be used as a service station - the purchaser claimed the report entitled it to rescind - the vendor sought rectification of the special condition so that either party would be entitled to rescind if the report showed that the property does not fall within the NSW EPA Guidelines in relation to the contamination levels in, on or under, notwithstanding that it permitted the property to be used as a Service Station - held: the *Contaminated Land Management Act 1997* (NSW) contains a general statutory regime which applies to contaminated land in NSW, and empowers the EPA to make management orders binding on the owner of contaminated land - rectification is only available where the evidence that the contract does not reflect the parties' common intention is clear and compelling - the claim for rectification failed - as to interpretation of the contract of sale, it was to be interpreted by reference to its text, context and purpose, and its context included any contract, document or statutory provision referred to in the contract - what the environmental report must do for rescission to be permitted is to "indicate" that the site does not fall within (that is, exceeds) relevant contamination levels - the report did identify some exceedences of investigation levels at the site, but, on the correct construction of the special condition, this was insufficient to give the purchaser a right of rescission - proceedings dismissed.
View Decision
[From Benchmark Monday, 29 April 2024]

In the matter of Riverina Solar Pty Ltd [2024] NSWSC 480
Supreme Court of New South Wales
Williams J
Insolvency - Tellhow is a foreign company registered under Division 2 of Part 5B.2 of the *Corporations Act 2001* (Cth), which appointed a local agent whose office is in Sydney, and nominated that office of its local agent its registered office in Australia - it served a statutory demand on Riverina Solar, giving its solicitor's Sydney office address as the address for service - on the final day on which it could seek to set aside the statutory demand, Riverina filed an application to set it aside in the Queensland Supreme Court - Riverina's solicitors sent the application and associated material, including the material required by the *Service and Execution of Process Act 1992* (Cth) to the Sydney solicitors by email - these emails were received before midnight on the final day to seek to set aside the statutory demand - the Queensland Supreme Court transferred Riverina's application to set aside the statutory demand to the NSW Supreme Court - the Court determined as a separate question whether Riverina had served the application within time as required by s459G of the *Corporations Act* - held: s600G of the *Corporations Act* is a general provision that permits a very wide range of documents, including, but not limited to, any document required or permitted to be given under any provision of Chapter 5 of the *Corporations Act*, to be given by electronic communication - s15(3) of the *Service and Execution of Process Act* is in mandatory terms, and provides that service of initiating process in a state other than the state in which the process was filed must be effected in accordance with s9 of that Act - the potential inconsistency between s600G and s15(3) did not warrant s600G being read as inapplicable to the service of any and all applications to set aside statutory demands - however, s9(9) of the *Service and Execution of*

Process Act t expressly excludes the operation of those provisions of the *Corporations Act* that cover the same field as, but are inconsistent with, s9 - the fact that s9 does not expressly exclude s600G provides no support for construing the general, facultative provisions of s600G as overriding the specific, mandatory provisions of s15(3) where the two provisions intersect - an application and supporting affidavit sent by email to the creditor's solicitors is not thereby left at the creditor's registered office within the meaning of s9(5) of the *Service and Execution of Process Act* - a solicitor is a fiduciary who acts on behalf of and in the interests of their client, but the solicitor's email and geographical addresses do not thereby become interchangeable with the addresses of the client - Riverina's application to set aside the statutory demand was not served within the statutory period.
View Decision
[From Benchmark Thursday, 2 May 2024]

Trident Austwide Pty Ltd v Bagcorp Pty Ltd as trustee for the Rico Tea Trust [2024] NSWSC 479
Supreme Court of New South Wales
Hmelnitsky J
Partnership - the parties carried on business as partners in the Madura Tea Estates partnership pursuant to the terms of a written agreement - in 2021, Trident retired from the partnership, having first given notice of its intended retirement some months before - the partnership agreement provided that the partnership would not be dissolved by reason only of the retirement of a partner and contained provisions permitting the remaining partners to purchase the retiring partner's interest as of right at a "fair" value, but the remaining partners did not avail themselves of that right, or cause Trident's interest to be offered for sale - Trident claimed to be entitled to an amount calculated by ascertaining the value of the partnership including goodwill as a whole as at the retirement date, and then multiplying that value by its partnership share of 19% - the remaining partners contended that Trident was entitled to the "market value" of its 19% interest as ascertained by a referee appointed by the Court, which the referee had held would include discounts for lack of control and lack of marketability - held: at common law and in the absence of any agreement, the retirement of a partner usually resulted in the general dissolution of the partnership, and the retiring partner's remedy in the absence of agreement was for the assets of the partnership to be brought in and sold, the debts paid off, and the surplus distributed after the taking of partnership accounts - Trident's entitlement on account must first be ascertained by reference to the partnership agreement - authority generally supports the taking of an account in these circumstances by calculating the outgoing partners aliquot share of the enterprise value as at the date of retirement - the amount to which Trident was entitled from the continuing partners was an amount equal to its share of the value of the enterprise as a whole as if on a taking of accounts as at that date of retirement, and not simply the amount for which its partnership interest might have been sold to a willing but not anxious purchaser on that date - the remaining partners' reliance on certain authority was misconceived, as Trident was not seeking to sell its partnership interest to anybody, and the "substance of the transaction" was not a sale of its interest to the remaining partners, but, rather, Trident was

seeking payment of its entitlement on retirement - this did not involve any unfairness to the continuing partners, as they had had a contractual right to acquire Trident's partnership interest for fair value, which they had declined - the Court adopted the referee's report in its entirety, but that did not mean that it accepted the referee's conclusion as to the market value of Trident's interest - the report allowed the Court to conclude that the amount due to Trident on a proper basis was a particular amount.
View Decision
[From Benchmark Thursday, 2 May 2024]

Bajwa Group Pty Ltd v Sharma & Ors [2024] VSC 195
Supreme Court of Victoria
McDonald J
Contracts - Bajwa was contacted by a real estate agent who told him that a parcel of land was coming on the market - Bajwa inspected the land and told the agent that he was interested in purchasing the land - the prospective vendors signed a letter of offer - Bajwa later met with the agent and also signed the letter of offer - the vendor's later decided not to proceed with the sale, and Bajwa commenced proceedings - held: the meaning of contractual terms are to be ascertained objectively having regard to the language of the contract, and where appropriate, the surrounding circumstances known to the parties - whether the parties intended the letter to be a binding contract was to be determined objectively from the text of the letter, construed in the context of the circumstances in which it came into existence - pre-contractual conduct was relevant and admissible on the question of whether each party by their words and conduct would have led a reasonable person in the position of the other party to believe that the letter was or was not intended to be a binding contract - post-contractual conduct was admissible on the question of whether the parties intended the letter to be a binding contract if the conduct constituted an admission against interest - subsequent negotiations between the parties may be relevant to demonstrate the nature and extent of the terms that might be necessary for the conclusion of a binding agreement but which were not included in the letter - the importance and extent of matters left unresolved when the letter was signed is an important consideration in determining whether, objectively, the parties intended the letter to be a binding contract - the letter was not described as a contract anywhere within its terms - if the letter did constitute a binding contract the vendors would have been obliged to sell the property to any entity put forward by Bajwa irrespective of whether that entity had the financial resources to pay the deposit and the balance of the purchase price - a reasonable person in the position of Bajwa and the prospective vendors would not have believed that they intended the letter to be a binding contract when the identity of the party liable to pay the purchase price, and the capacity of that party to make the payment, was not known - the absence of a statement that s32 of the *Sale of Land Act 1962* (Vic) required the vendor to give to the purchaser also tended to suggest that the parties did not intend the letter to be a binding contract - he letter did not constitute a binding contract - proceedings dismissed.
Bajwa Group Pty Ltd
[From Benchmark Tuesday, 30 April 2024]

Nasseri v Wellington Builders Pty Ltd & Ors [2024] VSC 200
Supreme Court of Victoria
Garde J
Building and construction contracts - the plaintiff signed a MOU and then a development management agreement with a property developer - the parties in due course fell into dispute - the builder made a payment claim under the *Building and Construction Industry Security of Payment Act 2002* (Vic) in the amount of about $150,000 for completing the base stage of the project - the plaintiff did not provide a payment schedule - an adjudicator found that the works were at base stage when the payment claim was made, and determined that about $160,000 was payable to the builder with an applicable rate of interest of 10% per annum - the plaintiff sought judicial review of the adjudicator's determination - held: identification of the parties to a contract must be in accordance with the objective theory of contract - when consideration was given to the text of the contract, the surrounding circumstances known to the parties, and the purpose and object of the parties, it was plain that the parties intended that the corporate trustee of a unit trust associated with the plaintiff to be a party to the contract - the handwritten changes to the contract and appendix to the contract made it clear that the parties intended that the unit trust have an important role under the contract and be subject to the rights and liabilities set out in its provisions - the plaintiff signed the contract because she was the landowner and this was entirely consistent with the parties' intention that the corporate trustee be a party to the contract - the post-contractual conduct of the parties overwhelmingly and compellingly pointed to the same conclusion - the contract was not void *ab initio* under s31(2) of the *Domestic Building Contracts Act 1995* (Vic) for want of signature by the building owner or authorised agent, as the plaintiff should be taken to have signed both in her own right as owner, and as authorised agent of the corporate trustee - the adjudicator had plainly correct when he treated the plaintiff and the corporate trustee as the respondents to the adjudication application - the adjudicator also had not erred in concluding that the plaintiff was 'in the business of building residences' within the meaning of s7(2)(b) of the *Building and Construction Industry Security of Payment Act* - where jurisdiction depends on a matter of fact, the Court determines the question of fact for itself on the evidence placed before it, the burden of establishing the facts which show an absence of jurisdiction always rests of the party applying for relief, and the standard of proof is high, requiring clear proof leading unmistakably to the conclusion that there was an excess of jurisdiction - the plaintiff and the builder were a commercial syndicate working together to achieve a profit-making objective, and both were in the business of building residences - the plaintiff's profit making intention could be ascribed also to the corporate trustee of the unit trust which was under her control - proceedings dismissed.
Nasseri
[From Benchmark Friday, 3 May 2024]

Carter & Anor v Mackey Motels Pty Ltd [2024] QCA 68
Court of Appeal of Queensland
Morrison & Dalton JJA, & Applegarth J

Leases - the Carters were lessees of a motel in Bundaberg from 2002 - Mackey Motels became the registered owner of the motel in 2007 - there were disputes about whether insurance premiums were outgoings under the lease, and Mackey Motel's obligation to maintain and repair, from 2011 - Mackey Motels served a notice to remedy the failure to pay outgoings - the Carters did not comply with the notice, and then also did not pay rent shortly before commencing proceedings in 2016 - Mackey purported to re-enter, and the Carters gave up possession - Mackey Motels sought payment of the outstanding rent - a judge of the Supreme Court gave Mackey Motels summary judgment for the two months of outstanding rent, based on the terms of the lease that required payment without set-off or counterclaim and free and clear of any withholding or deduction - the Court also held that the Carters' claim for recovery of insurance premium outgoings failed, and a counterclaim by Mackey Motels for unpaid insurance premium outgoings succeeded - the Carters appealed - held: the appellants had not proved that, upon the proper interpretation of the relevant clause in the lease, the insurance required by the landlord (Mackey Motels) in 2011 and later years was "substantially different" to the insurance held by the previous landlord immediately prior to the commencement of the lease - insurance taken out by an owner to protect its interests may also protect the tenant's interests and incline the tenant to not take out its own cover and create a double insurance problem - a tenant under a long lease, like the owner, has an interest in the leased premises - both policies here were in the name of the "owner", and a change in the identity of the owner did not make the policies substantially different - the fact that the earlier land operated the motel directly made it practically impossible to determine the extent to which the earlier protected a hypothetical tenant before commencement of the lease, and to compare the cover it provided with the cover and the later policy obtained by Mackey Motels - the Carters were not entitled to recover any part of the outgoings that they had paid after 2011 and they had no defence to Mackey Motels' counterclaim for premiums it incurred - the primary judge correctly held that the failure to make and advance insurance claims so as to rectify damage sustained in 2011 and 2013 was not pleaded as a breach of the lease or any other obligation; and considered the defects and damages claims in the Carter's case for alleged breach of the landlord's obligations - the motel's old and tired appearance and the absence of upgrades prior to the termination of the lease explained the decline in its financial fortunes between 2010 and 2016, and the Carters' reliance on this as part of their case was misconceived because, apart from any specific obligation, there was no duty to undertake upgrades - the Carters' global claim for lost profits therefore failed on the issue of causation - appeal dismissed.
Carter & Anor
[From Benchmark Friday, 3 May 2024]

Munupi Wilderness Lodge Pty Ltd v Executive Director of Township Leasing [2024] NTSC 36
Supreme Court of the Northern Territory
Brownhill J
Equitable leases - Munupi operated a fishing lodge as a tourism business from land on Melville Island - from 2005, Munupi occupied the land pursuant to a lease granted by the Tiwi Aboriginal

Land Trust, which was an Aboriginal Land Trust that held the fee simple title to Melville Island pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) - from 2010, Munupi occupied the Land pursuant to rights and interests arising in equity in the form of an equitable lease on the same terms as the original lease, including provision for a five year term with an option to renew - the equitable lease expired in 2015, and Munupi did not exercise the option to renew - Munupi then occupied the land under a holding over clause in the equitable lease as a quarterly tenant - Munupi did not pay rent from 2016, and the parties were unable to negotiate a new lease - in 2017, the Trust granted EDTL a lease over the township of Pirlangimpi which included Munupi's land - this lease was under s19 of the *Aboriginal Land Rights (Northern Territory) Act*, which preserved rights existing before commencement of the lease - EDTL issued Munupi with a notice to quit - the Local Court ordered Munupi to vacate the premises - Munupi appealed on questions of law - held: the grounds of appeal were not framed as questions of law, but at their heart were two questions of law: (1) is the EDTL the 'agent' of the Commonwealth within the meaning of s125 of the *Business Tenancies (Fair Dealings) Act 2003* (NT) such that written authority, outside of s20C of the *Aboriginal Land Rights (Northern Territory) Act*, was required from the Commonwealth for the EDTL to issue the notice to quit? and (2) was there no evidence on which to find that the requirements for consultation in cl23 of the township lease had been met in relation to the EDTL's issuance of the notice to quit? - the provisions of Part 13 of the *Business Tenancies (Fair Dealings) Act* applied to the interests of Munupi under the holding over provision in the equitable lease - the fact that estates or interests granted by Land Trusts which exceed 40 years require the Commonwealth Minister's consent does not mean that, as a consequence, the Land Trust, which owns the fee simple, is acting as the Commonwealth's agent in respect of the estate or interest granted - the ordinary meaning of the word 'administer', read in its statutory context, clearly extends to the determination of a quarterly tenancy created under the holding over clause in the equitable lease - even if Munupi could establish that there was no evidence that the EDTL consulted with a Consultative Forum regarding issuing the notice to quit, the Local Court's conclusion that the requirements for consultation under the township lease were satisfied sas not an error of law which vitiated the decision - appeal dismissed.

Munupi Wilderness Lodge Pty Ltd

[From Benchmark Friday, 3 May 2024]

Executive Summary and (One Minute Read)

R v Secretary of State for the Home Department (UKSC) - Failed asylum seeker who committed criminal acts within the UK and who thwarted his deportation was lawfully refused government benefits and was not denied his rights under the *European Convention on Human Rights*

Summaries With Link (Five Minute Read)

R v Secretary of State for the Home Department [2024] UKSC 13
Supreme Court of the United Kingdom
Lord Lloyd-Jones, Lord Sales, Lord Hamblen, Lord Stephens, and Lady Simler
AM was a national of Belarus. He arrived in the UK in 1998 and claimed asylum. In 2000, he was denied asylum status and removed to Belarus. He was denied entry to Belarus and returned to the UK because he provided Belarus officials with false information that caused the officials to believe that he was not a citizen. Upon his return to the UK, he committed various criminal offences and was classified as a foreign criminal by British authorities. The Government desired to extradite AM to Belarus, but he resisted these attempts. Further, the British authorities refused to grant AM Leave to Remain, which would entitle him to full government benefits. Instead, AM is in 'limbo' status under which (1) he may not seek employment in the UK, (2) he is not entitled to National Health Service benefits, excepting emergency care, (3) he may not open a bank account, (4) he may not enter into a tenancy agreement, and (5) he receives very limited social welfare benefits, at the same level of failed asylum seekers awaiting deportation. Instead, he received a payment card for food, clothing, and toiletries at a subsistence level and government accommodation. As AM may not return to Belarus, he claimed that the British Government's action of placing him in a legal 'limbo' amounted to a denial of his rights under Article 8 of the *European Convention of Human Rights*, and that the Government had to grant him Leave to Remain status that would enable him to obtain full public benefits. Article 8 provides that 'everyone has the right to respect for his private and family life' and that 'there shall be no interference by a public authority in the exercise of this right except as in accordance with law and is necessary in a democratic society in the interests of national security, public safety' - administrative tribunals and then the Court of Appeal agreed with AM, and ordered the Home Secretary to grant AM Leave to Remain status. On review, in a unanimous decision, the Supreme Court reversed the Court of Appeal and held that the Home Secretary did not violate AM's Article 8 rights by placing him in 'limbo' status. The Supreme Court found that AM's attempts to thwart his deportation were highly material factors in evaluating whether the Home Secretary's actions were proportional. The Court added that the

public interest in maintaining effective immigration controls and containing welfare expenditures were relevant considerations. There was also a public interest in maintaining British employment opportunities for those lawfully in the UK. The Court said that, given AM's serious criminal offences, his deportation was in the public interest, and his efforts to undermine that through fraudulent activity were also valid considerations. While AM was entitled to Article 8 protections, the Supreme Court concluded that his extended limbo status was a proportionate means of achieving the lawful aims of the British Government.
R v Secretary of State for the Home Department

Poem for Friday

Song of Hope

By: Thomas Hardy (1840-1928)

O sweet To-morrow! –
After to-day
There will away
This sense of sorrow.
Then let us borrow
Hope, for a gleaming
Soon will be streaming,
Dimmed by no gray –
No gray!

While the winds wing us
Sighs from The Gone,
Nearer to dawn
Minute-beats bring us;
When there will sing us
Larks of a glory
Waiting our story
Further anon –
Anon!

Thomas Hardy, (2 June 1840 - 11 January 1928), author and poet, was born in Dorset, England. His father was a stonemason, and his mother who was well read, educated Thomas to the age of 8, at which time Thomas commenced as a student at Mr Last's Academy for Young Gentlemen. On leaving school at the age of 16, due to his family's lack of finances to fund a university education, Thomas became an apprentice architect. Much of his work involved the restoration of churches. In 1862 he enrolled at King's College, London. He is best known for his novels, including *Far from the Madding Crowd,* (1874) and *Tess of the d'Urbervilles,* (1891). He was appointed a Member of the Order of Merit in 1910 and was nominated for the Nobel Prize in Literature in that year. He received a total of 25 nominations for the Novel Prize for literature during his life. Thomas Hardy died of pleurisy on 11 January 1928. He had wanted his body to be buried with his first wife Emma's remains at Stinsford. She had died in 1912 and much of his poetry was inspired by his feelings of grief following her death. His Executor Sir Sydney Carlyle Cockerell compromised by having Thomas Hardy's heart buried with the remains of his first wife Emma, and his ashes interred at Poets' Corner, Westminster Abbey. At the time of his death his estate was worth 95,418 pounds, the equivalent of over 6 million pounds

today. One of the largest literary societies in the world is the Thomas Hardy Society, based on Dorchester, https://www.hardysociety.org/.

Song of Hope by Thomas Hardy, read by Dylan Pearse, Music by Irish Folk Group, Kern
https://www.youtube.com/watch?v=Q1qo8sWTi6M

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