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Benchmark

Friday, 15 March 2024

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)

Hankuk Carbon Co, Ltd v Energy World Corporation Ltd (FCA) - the Court made orders under s8 of the *International Arbitration Act 1974* (Cth) for the recognition and enforcement of foreign arbitral awards

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)

Hankuk Carbon Co, Ltd v Energy World Corporation Ltd [2024] FCA 232
Federal Court of Australia
Stewart J
Arbitration - Hankuk Carbon, a company incorporated in the Republic of Korea, as seller, entered into a contract with Energy World Corporation, an Australian registered company listed on the ASX, as buyer, for the supply and delivery of goods, including insulation panels and stainless steel membranes to be used in the building of an LNG storage tank in the Philippines - the contract included a term that all disputes, controversies, or differences between the parties in relation to the contract or for its breach would be finally settled by arbitration - a dispute arose regarding non-payment for completed shipments under the contract, and failure to accept goods delivered under the contract - Hankook Carbon commenced arbitral proceedings in Hong Kong - it obtained two arbitral awards, a merits award and a costs award - Hankuk Carbon sought orders under s8 of the *International Arbitration Act 1974* (Cth) for the recognition and enforcement of these awards - held: the Court was satisfied that Hankuk Carbon and Energy World Corporation were parties to the arbitration agreement, that the arbitration was convened pursuant to that agreement, and that Hankuk Carbon and Energy World Corporation were the parties to the merits award and the costs award - Energy World Corporation brought proceedings at the seat of the arbitration, Hong Kong, to set aside the awards, but was unsuccessful; and was denied leave to appeal - the awards were final in the sense that they were no longer subject to any revision or variation by the Tribunal, and they were also no longer subject to recourse at the seat - Hankuk Carbon sought a two-stage form of order with a a process of entering judgment and then staying that judgment to give Energy World Corporation the opportunity to apply to set it aside - this was slightly different from the form of orders more commonly made in the Federal Court - there was precedent for this form of orders in Victoria, England and Wales, and Hong Kong - the Court was satisfied that such form of orders was appropriate where the award creditor has not been notified by an award debtor of an intention to object to enforcement of the award with particulars of the basis or bases for that position, the award creditor is not otherwise aware of any reasonably arguable basis upon which the award debtor may object, and the award debtor has unsuccessfully exhausted its options of setting aside the award at the seat - orders made as sought.
Hankuk Carbon Co, Ltd
[From Benchmark Friday, 15 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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