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Benchmark

Friday, 26 April 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)

Fitzgerald, in the matter of Tempo Holidays Pty Ltd (in liq) v Tully (FCA) - insurer not liable for settlement of breach of director's duties claim, as it had not been shown it was reasonable, or that the case against the director would have succeeded

TMA Australia Pty Limited v 100% Bottling Company Pty Ltd (NSWCA) - trial judge had not erred in failing to be satisfied that an email exchange said to have constituted an agreement to for a print run of adhesive labels was genuine

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Summaries With Link (Five Minute Read)

Fitzgerald, in the matter of Tempo Holidays Pty Ltd (in liq) v Tully [2024] FCA 391
Federal Court of Australia
McElwaine J
Insolvency - Tempo's liquidator brought claims against Tully, a former director, for (1) breach of statutory and fiduciary duties by failing to monitor the inter-group transfer of funds pursuant to an informal debtor/creditor arrangement, under which debts were unsecured and became unrecoverable; and (2) insolvent trading under s588M of the *Corporations Act 2001* (Cth) - the insurer under a Management Liability Insurance Policy declined to indemnify Tully for breach of the director's duty claim (it was not in issue that it had no liability to indemnify Tully for the insolvent trading claim) - the proceedings settled with Tully consenting to judgment for about $6million on the director's duty claim and about $24million on the insolvent trading claim, with the liquidator agreeing to enforce the judgment first against the insurer, and after that only against a security sum of $500,000 provided by Tully - the liquidator sought to recover from the insurer - held: indemnity was provided on a claims made and notified basis - courts "allow some leeway" in requiring correlation between an original demand and the way in which a claim is ultimately pleaded - the demand that the liquidator had originally sent Tully for payment of about $5million for breach of director's duties and/or insolvent trading was not of a different legal and factual character than the claim now sought to be made against the insurer - for a claim to be made within the meaning of the policy, no more was required than a written demand against an insured person for compensation or damages - what amounts to a claim is a question of fact, and there is no magic formula - although Tully's liability under the settlement was capped at $500,000, the insurer appropriately did not contend that its liability was also so limited - the liquidator's evidence as to the reasonableness of the settlement was insufficient - the settlement was therefore not a basis to claim against the insurer - whether one concentrated on the content of Tully's duties as pleaded or on the more expansive framing of the claim in the liquidator's closing submissions, the evidence was insufficient to make good either of breach of duty cases pursuant to s180 or s181 of the *Corporations Act* - the liquidator also failed to prove that any contravention by Tully resulted in damage being suffered by Tempo - further, Tempo had been aware of four matters that a reasonable person in the circumstances could be expected to know were relevant to the insurer's decision to accept the risk and on what terms - therefore, Tempo had breached its duty of disclosure under s21 of the *Insurance Contracts Act 1984* (Cth) - proceedings dismissed.
https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2024/2024fca0391
[From Benchmark Wednesday, 24 April 2024]

TMA Australia Pty Limited v 100% Bottling Company Pty Ltd [2024] NSWCA 80
Court of Appeal of New South Wales
Bell CJ, Leeming JA, & Basten AJA
Contracts - TMA Australia Pty Ltd was a commercial printer. 100% Bottling Company Pty Ltd was a commercial bottling company, and both had relationships with Metcash, which supplied

IGA supermarkets - in 2015, TMA and 100% Bottling explored a possible agreement by which the appellant would take over printing labels, in particular in relation to Black & Gold cooking oil, which was a house brand used by Metcash, and TMA printed 1,000,000 back and front self-adhesive labels for Black & Gold cooking oil - the print run greatly exceeded the purchase orders provided by 100% Bottling over the following three years, and a dispute arose as to whether 100% Bottling was obliged to pay for the whole of the print run within a reasonable time - TMA relied on an alleged exchange of emails which included a direction by 100% Bottling to TMA to undertake the print run forthwith - 100% Bottling alleged the exchange of emails was fabricated - the primary judge in the District Court was not satisfied the exchange of emails was genuine, and held against TMA - TMA appealed to the Court of Appeal - held: the primary judge's findings as to the unreliability of the evidence of TMA's Corporate Accounts Manager were beyond challenge, and those findings may have been generous to that witness - none of the grounds of appeal challenging the primary judge's findings in this respect was maintainable - the trial judge relied on eight matters which led him to a failure to be satisfied on the balance of probabilities that the disputed email exchange occurred, and that conclusion should be upheld - in the Court's view, the case for 100% Bottling was even stronger than the conclusion reached by the trial judge - discussion of "commerciality" during the appeal hearing had proceeded as if that word defined an independent standard against which likelihoods could be measured - that was misleading, as there is no standard of commerciality, but rather there may be business practices which may provide context against which to judge the plausibility of the asserted conduct on both sides of the record - appeal dismissed.

View Decision

[From Benchmark Friday, 26 April 2024]

Executive Summary and (One Minute Read)

Kirkorov v Lithuania (Eur Ct HR) - Decision of Lithuania to deny entry to Russian entertainer on national security grounds did not amount to a violation of Article 10 (freedom of expression) of the *European Convention on Human Rights*

Summaries With Link (Five Minute Read)

Kirkorov v Lithuania, ECHR 096 (2024)
European Court of Human Rights
Bårdsen P, Ilievski, Kuris, Yüksel, Schembri Orland, Krenc, & Derencinovic JJ
Kirkorov was a popular singer from Russia who had been found by the Lithuanian Migration Department to have publicly supported Vladimir Putin and supported Russia's actions in Crimea. The government of Lithuania placed Kirkorov on a list of aliens barred from entering the country. Kirkorov unsuccessfully challenged this decision in the Lithuanian courts. Kirkorov then brought proceedings before the European Court of Human Rights alleging that the actions of Lithuania violated his right to freedom of expression guaranteed by Article 10 of the *European Convention of Human Rights*. Article 10 provides that everyone has the right to freedom of expression without interference by public authority and regardless of frontiers. However, these rights may be subject to such restrictions as are prescribed by law "and are necessary in a democratic society, in the interests of national security' or public safety. The European Court found that, while the right of a foreigner to remain in a country is not a Convention right, 'immigration controls must be exercised consistently with Convention obligations'. The Court ruled that the ban on entry was materially related to the right of expression because, under Article 10, no distinction can be drawn between nationals and foreigners. As entry to Lithuania was denied on the basis of Kirkorov's past statements, the Court found that there had been an interference with his Article 10 rights. The issue came down to whether Lithuania's actions were permissible as being prescribed by law and necessary in the interests of national security. The Court found that Lithuania's actions were prescribed by law that purported to be based on national security. Nevertheless, it was for the courts to determine whether the invocation of national security had a reasonable basis or was contrary to common sense. The Court concluded that there had not been a violation of Article 10 in light of the careful scrutiny by the Lithuanian courts to the claim that Kirkorov represented a threat to national security. Further, the European Court held that the measures taken by Lithuania were not disproportionate and that the national courts had properly weighed the interests of national security against the measures taken against Kirkorov.
Kirkorov

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Poem for Friday

The Song of a Comet

By: Clark Ashton Smith (1893-1961)

A plummet of the changing universe,

Far-cast, I flare

Through gulfs the sun's uncharted orbits bind,

And spaces bare

That intermediate darks immerse

By road of sun nor world confined.

Upon my star-undominated gyre

I mark the systems vanish one by one;

Among the swarming worlds I lunge,

And sudden plunge

Close to the zones of solar fire;

Or 'mid the mighty wrack of stars undone,

Flash, and with momentary rays

Compel the dark to yield

Their aimless forms, whose once far-potent blaze

In ashes chill is now inurned.

A space revealed,

I see their planets turned,

Where holders of the heritage of breath

Exultant rose, and sank to barren death

Beneath the stars' unheeding eyes.

Adown contiguous skies

I pass the thickening brume

Of systems yet unshaped, that hang immense[67]

Along mysterious shores of gloom;

Or see—unimplicated in their doom—

The final and disastrous gyre

Of blinded suns that meet,

And from their mingled heat,

And battle-clouds intense,

O'erspread the deep with fire.

Through stellar labyrinths I thrid

Mine orbit placed amid

The multiple and irised stars, or hid,

Unsolved and intricate,

In many a planet-swinging sun's estate.

Ofttimes I steal in solitary flight

Along the rim of the exterior night

That grips the universe;

And then return,

Past outer footholds of sidereal light,

To where the systems gather and disperse;

And dip again into the web of things,

To watch it shift and burn,

Hearted with stars. On peaceless wings

I pierce, where deep-outstripping all surmise,

The nether heavens drop unsunned,

By stars and planets shunned.

And then I rise

Through vaulting gloom, to watch the dark

Snatch at the flame of failing suns;

Or mark

The heavy-dusked and silent skies,[68]

Strewn thick with wrecked and broken stars,

Where many a fated orbit runs.

An arrow sped from some eternal bow,

Through change of firmaments and systems sent,

And finding bourn nor bars,

I flee, nor know

For what eternal mark my flight is meant.

Clark Ashton Smith was born on 13 January, 1893, in Long Valley, Placer County, California. Largely self-taught, he began writing at a very young age, acquiring an exceptionally large vocabulary by reading the dictionary from cover to cover. A protégé of the San Francisco poet George Sterling, Smith achieved recognition at the age of 19 for his collection of poems The Star Treader (1912), influenced by Baudelaire, Poe and Sterling. Smith always considered himself a poet first and foremost, however, following the Great Depression, he later turned to writing short stories for pulp magazines such as Weird Tales as this was a more lucrative source of income to support himself and his aging parents. He wrote more than 100 short stories between 1929 and 1934, and it is this, along with his friendship with fellow Weird Tales contributor H. P. Lovecraft, for which he is remembered today. Smith lived most of his life in Auburn, California, and passed away in his sleep on 14 August 1961, at the age of 68. In addition to his literary activities, he created a large number of drawings, paintings and sculptures which reflected the otherworldly atmosphere of his tales.

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