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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)

Skycity Adelaide Pty Ltd v Treasurer of South Australia & Anor (No 2) (SASCA) - parties ought not assume that they will necessarily be given an opportunity to address costs in writing after the delivery of reasons for judgment - in this case, the costs order made at the time of delivery of judgment should stand

Australian Competition and Consumer Commission v Bloomex Pty Ltd (FCA) - civil penalty of $1million ordered for misleading or deceptive conduct through a florist company's website

Business Finance Pty Ltd (in liq) v Casula Projects Pty Ltd (NSWSC) - defendant failed to establish an Anshun estoppel arising out of earlier proceedings regarding a mortgage

HABEAS CANEM

The scent on the breeze

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Summaries With Link (Five Minute Read)

Skycity Adelaide Pty Ltd v Treasurer of South Australia & Anor (No 2) [2024] SASCA 18
Court of Appeal of South Australia
Livesey P, Lovell, & Bleby JJA
Taxation - SkyCity operates the SkyCity Casino pursuant to a licence granted under the *Casino Act 1997* (SA) - s16 of the *Casino Act* provides for an Approved Licensing Agreement between the licensee and the Minister - s51 imposes liability on SkyCity, as licensee, to pay casino duty - duty is calculated under a Casino Duty Agreement ("CDA") that exists pursuant to s17 - there was a dispute as to the correct interpretation of the current CDA and the duty payable in accordance with it, and the parties agreed that SkyCity would commence proceedings in the Supreme Court - the Corut of Appeal answered three questions of law (see Benchmark 19 March 2024) - the Court intimated that Skycity should pay 75% of the Treasurer's costs of the hearing but granted Senior Counsel for Skycity further time to consider his position and, if so advised, to put a written submission on costs - Skycity put on further submissions, contending that 75% of the case could be attributed to issues raised by the first two questions, on which the Treasurer succeeded, and 25% could be attributed to the third question, on which Skycity succeeded, which would have the effect that the Skycity should pay 75% of the Treasurer's cost, but should recover 25% of its costs, and these orders should be set off with the result that Skycity should pay 50% of the Treasurer's costs - held: parties ought not assume that they will necessarily be given an opportunity to address costs in writing after the delivery of reasons for judgment, and, in most cases, the broad parameters of any costs dispute are likely to be clear and the Court expects the parties to be in a position to put submissions at the time reasons are delivered - while costs should be addressed in a manner that is both judicial and logical, it is necessary to address costs issues without undue expense or delay and, usually, in a broad way - in the Court's assessment, very much less than 25% of the time and costs of the hearing was required for the third question - success on an issue by an otherwise unsuccessful appellant does not necessarily translate into an order that the appellant recover costs on that issue - while acknowledging that there is now a greater preparedness to award costs by reference to issues, the Court may determine that justice will be done by denying a successful party a proportion of its costs on the issue on which it failed and without ordering that the unsuccessful party recover costs on the issue on which it succeeded - there is no need to disturb the costs order made by this Court at the time of delivery of judgment.
https://austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SASCA/2024/18.html
[From Benchmark Monday, 25 March 2024]

Australian Competition and Consumer Commission v Bloomex Pty Ltd [2024] FCA 243
Federal Court of Australia
Anderson J
Misleading or deceptive conduct - Bloomex is a large online floristry and gift retailer the ACCC commenced proceedings in connection with material published on Bloomex's website about advertised discounts, customer ratings, and prices - Bloomex admits those representations

were false or misleading and that, consequently, it contravened s18(1), s29(1)(a), (g), (i) and s48(1) of the *Australian Consumer Law* - the ACCC and Bloomex have agreed on proposed final orders and filed joint submissions explaining why they considered the proposed orders to be appropriate - the only outstanding matter was the quantum of penalties - the ACCC sought order for civil penalties totalling $1,500,000 - Bloomex submits that an appropriate penalty would be not more than $350,000 - held: for the relevant period, almost all of the approximately 730 products advertised for sale on the website were accompanied by two prices: the price for purchase of the product, and a higher price displayed in strikethrough form - Bloomex had never sold, nor had it offered for sale, any of the products at the strikethrough price, which was higher than the price at which Bloomex ordinarily sold each product - there was similar misleading or deceptive conduct regarding products said to be 50% off - further, purported rating by number of stars were not a reliable indicator of the degree of customer satisfaction for each product - further, Bloomex engaged in misleading or deceptive conduct regarding the total price during the checkout process - the primary purpose of civil penalties is deterrence, by putting a price on contravention that is sufficiently high to deter repetition by the contravener (specific deterrence) and by would-be contraveners (general deterrence) - it was appropriate for the Court to adopt an approach based on three courses of conduct which refer to each of the distinct categories of contravening representations - in the case of the discount representation and the star rating representations, Bloomex's wrongdoing was serious in nature - the total product price representations were of lesser seriousness - it was not possible to precisely quantify the value of benefits that Bloomex had received as a result of the discount representations and the star rating representations - the Court also considered the deliberateness of Bloomex's conduct, and the involvement of senior management in the contravening conduct - the Court considered Bloomex's cooperation and contrition - a civil penalty of $1 million was ordered.
Australian Competition and Consumer Commission
[From Benchmark Thursday, 28 March 2024]

Business Finance Pty Ltd (in liq) v Casula Projects Pty Ltd [2024] NSWSC 252
Supreme Court of New South Wales
McGrath J
Anshun estoppel - Business Finance carried out lending operations at high interest rates - Casula Projects was incorporated on the instructions of the controller of Business Finance, with that person's nephew as the sole director - Business Finance made a loan of $1.23 million to Casula Projects under a loan agreement with an interest rate of 24% per annum, to fund Casula Projects' acquisition of a townhouse in Surfers Paradise - Casula Projects was required to provide a first registered mortgage over the property to Business Finance, which it did - the controller of Business Finance procured the discharge of the mortgage, purportedly on the basis that the loan had been refinanced by a related company of Business Finance - Business Finance went into receivership, and then into liquidation - a judge of the Supreme Court made orders including a declaration of the quantum of secured money under the mortgage, and that partial repayments had been made on certain dates - a new mortgage over the property was registered - Business Finance and the Receiver then commenced new proceedings, alleging

that the previous judgment did not determine the issue of the quantum of the full amount of the debt owing by Casula Projects to Business Finance pursuant to the loan agreement, and seeking the recovery of that debt - Casula Projects sought that the claim be summarily dismissed, or alternatively that certain paragraphs of the statement of claim be struck out, on the basis of an *Anshun* estoppel - held: *Anshun* estoppel precludes the assertion of a claim, or the raising of an issue of fact or law, if that claim or issue was so connected with the subject matter of the first proceeding as to have made it unreasonable in the context of that first proceeding for the claim not to have been made or the issue not to have been raised in that proceeding - here, there was no evidence that Business Finance and the Receiver had made a forensic decision not to claim particular fees at the trial of the earlier proceedings - there had been no finding that Business Finance was not entitled to claim those fees, which claim could be met by appropriate defences - Casula Projects' decision not to challenge the interest rate of 24% and compounding interest in the earlier proceedings was a matter for it - there was no basis on which the Court could conclude that the failure of Business Finance and the Receiver to claim the fees was unreasonable so as to give rise to an *Anshun* estoppel.
View Decision
[From Benchmark Monday, 25 March 2024]

Executive Summary and (One Minute Read)

Lifestyle Equities v Amazon UK Services Ltd (UKSC) - In a cross-border sale of merchandise where the same trade mark was owned by different entities in USA and UK, Amazon was liable for trade mark infringement where UK customers were targeted by Amazon's US website

Summaries With Link (Five Minute Read)

Lifestyle Equities v Amazon UK Services Ltd [2024] UKSC 8,
Supreme Court of the United Kingdom
Lord Hodge, Lord Briggs, Lord Hamblen, Lord Burrows, & Lord Kitchin
The trade mark at issue was the 'Beverly Hills Polo Club' brand. The holder of the mark in the EU/UK was Lifestyle Equities which is unrelated to the brand owner in the USA. A UK resident ordered US sourced goods bearing the trade mark through Amazon's US website. The owner of the EU trade mark contended that Amazon was liable for trade mark infringement because it targeted consumers in the UK/EU. This matter concerned conduct that occurred before Brexit. Applying EU law, the Supreme Court said that Amazon could only be liable for trade mark infringement in a cross-border sale if it in fact targeted consumers in the UK. The mere fact that a foreign website is accessible to a UK resident is insufficient to establish targeting of a UK consumer. The question for the court was whether an average consumer within the UK, who is reasonably well-informed and observant, would consider the website targeted at that consumer. The Court found that targeting had occurred because Amazon offered to deliver to the UK, in a dialog box Amazon specified which goods could be shipped to the UK, and specified UK delivery times and featured the option to pay in British currency. The Supreme Court also stated that Amazon's subjective intent was not the key issue. Rather, the question was one of objective fact taken from the perspective of the average consumer. Intent may, however, be taken into account to the extent it is relevant to the objective assessment made by the court.
Lifestyle Equities

Poem for Friday

The Nightingale

By: Sara Coleridge (1802-1852)

In April comes the Nightingale,
That sings when day's departed;
The poets call her Philomel,
And vow she's broken-hearted.

To them her soft, sweet, ling'ring note
Is like the sound of sorrow;
But some aver, no need hath she
The voice of grief to borrow.

No, 'tis the merry Nightingale,
Her pipe is clear and thrilling;
No anxious care, no keen regret,
Her little breast is filling.

She grieves when boys have robb'd her nest,
But so would Stork or Starling;
What mother would not weep and cry
To lose her precious darling?

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