



Friday, 30 August 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)

Oliveri Legal Pty Ltd v Danis (NSWSC) - appeal dismissed against finding upholding an alleged contract between a service provider and a firm of solicitors

Christer Nominees Pty Ltd v Calabria Community Club Ltd (NSWSC) - real estate agent succeeded in recovering fees for the marketing and selling of multiple units in a strata development

Headway Global Pty Ltd v Golden Seeds Education Pty Ltd (NSWSC) - lessor of a childcare centre had made an improper demand for rent, but that demand had not constituted a repudiation

Abdel-Messih atf The Abdel-Messih Superannuation Fund (WASC) - Court upheld a guarantee in a loan agreement, and rejected that the advance of money had in fact been an investment in property development

HABEAS CANEM

McGregor the puppy



Summaries With Link (Five Minute Read)

Oliveri Legal Pty Ltd v Danis [2024] NSWSC 1063

Supreme Court of New South Wales

Chen J

Contracts - Danis was a financial market trader, with a background as an accountant, who contended that he had entered into an agreement with Oliveri, a firm of solicitors, to provide services in connection with one of the solicitors' client's claim against his mother's estate in return for 50% of the legal fees paid in that matter - he brought proceedings in the Local Court for payment under this agreement - the Magistrate accepted the agreement had been made, and that Oliveri had failed to pay, and gave judgment in Danis's favour - Oliveri appealed to the Supreme Court - held: an appeal only lay as of right on questions of law, and by leave with respect to questions of mixed fact and law - Oliveri had asked for leave to appeal to the extent necessary, and then had contended that all but one ground of appeal involved only a question of law, but made no attempt to identify a question of law in connection with any of those grounds - if, upon proper analysis, a question is not one of law, linguistic gymnastics in the formulation of the grounds of appeal cannot convert it into a question of law - there is "a question of law alone" if the question of law can be stated and considered separately from the facts with which it may be connected in a given case - the answer to the question of law, and the consequential questions that follow from its resolution, must be material to the outcome - Oliveri was not denied procedural fairness by the Magistrate making an adverse credibility finding against its principal witness, Mr Oliveri, contrary to the rule in *Browne v Dunn* - Danis had sufficiently cross-examined Mr Oliveri in connection with the relevant matters - Oliveri was sufficiently put on notice of the relevant issue and had had an opportunity to address it - the Magistrate's reasons had been sufficient - the Magistrate had not drawn illogical, unreasonable and inconsistent inferences - appeal dismissed.

[View Decision](#)

[From Benchmark Monday, 26 August 2024]

Christer Nominees Pty Ltd v Calabria Community Club Ltd [2024] NSWSC 1071

Supreme Court of New South Wales

Griffiths AJA

Contracts - Christer sued to recover alleged unpaid commission fees for from Calabria Community Club, in respect of the marketing and selling of multiple units in a strata development the Club had undertaken on its land - the Club contended that two exclusive agency agreements were not binding because they were only executed by one of the Club's directors, rather than two as required by a resolution of the board - the Club also said Christer was prevented from recovering the alleged unpaid commission fees because of its failure to comply with several requirements in the *Property, Stock and Business Agents Act 2002* (NSW) and the *Property, Stock and Business Agents Regulation 2014* (NSW) - held: the first exclusive agency agreement gave rise to a binding and enforceable legal agreement - this was consistent with relevant legal principles, including those relating to inferences reasonably to be drawn from

the parties' relationship in a commercial context - the single director who had signed had also had implied actual authority to execute both agreements - assuming there had been a failure to comply with s55 of the Act (by failing to serve a copy of an agency agreement within 48 hours after it was signed), this was a clear case for a favourable exercise of the discretion under s55A to ameliorate that failure - failure to comply with s36 had not been adequately pleaded in the Club's defence - s56 had not application in this case - judgment for Christer.

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[From Benchmark Tuesday, 27 August 2024]

Headway Global Pty Ltd v Golden Seeds Education Pty Ltd [2024] NSWSC 1068

Supreme Court of New South Wales

Peden J

Contracts - Headway purchased property with a development approval to build a childcare centre - it then leased the property to Golden Seed - the lease commenced when the lessee "obtained Childcare centre provider approval" - the parties then appeared to work together towards the construction of the childcare centre - before construction was complete, Golden Seeds obtained "provider approval" for "the provision of an education and care service" under Part 2 of the *Children (Education and Care Services) National Law 2010* (NSW) and Part 2.1 of the *Education and Care Services National Regulations 2011* (NSW), and did not inform Headway of that fact - Golden Seeds still required "service approval" for a particular "education and care service" to be operated at the premises under Part 3 of the *National Law* and Part 2.2 of the *National Regulations* - about nine months later, Golden Seeds obtained service approval - Headway claimed that the lease had commenced upon grant of provider approval, and that it was owned rent for the nine month period, and called on the bank guarantee to partially satisfy its demand for such rent - Golden Seeds contended this was wrongful, was a repudiation of the lease, and accepted such repudiation - held: a contract must be construed in accordance with its objective meaning, and a technical meaning can be given to words when it is apparent that the parties intended such a technical meaning - Headway had not established that "provider approval" should have its technical meaning as set out in the *National Law* and the *National Regulations* - rather, the proper construction of the lease was that "provider approval" required Golden Seeds obtaining all approvals necessary to operate the childcare centre from the premises - even if this were not the case, the lease should be rectified - Headway's claim for rent therefore failed - however, Golden Seeds had also not discharged its burden of showing that Headway had repudiated the lease - the bona fides of the party allegedly repudiating are irrelevant, unless that party is acting on a mistaken view of the true legal position - at no point before claiming repudiation did Golden Seeds explain to Headway the reasons for its preferred construction of the lease, or its rectification case - there was no basis from which to infer that Headway was persisting "willy nilly" to a wrongful construction of the lease in the face of a clear enunciation of the true agreement - rather, Headway acted on a bona fide understanding of the construction of the words in the lease - Headway's conduct had not amounted to a repudiation - therefore, Golden Seeds' vacation of the premises and purported termination had itself amounted to a repudiation, which Headway had accepted - parties to attempt to agree on

orders to be made.

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[From Benchmark Tuesday, 27 August 2024]

Abdel-Messih atf The Abdel-Messih Superannuation Fund [2024] WASC 304

Supreme Court of Western Australia

Hill J

Guarantees - the plaintiffs (as trustees of their family superannuation fund) advanced \$900,000 to ProMEQ, a company associated with Qaqish - Qaqish guaranteed ProMEQ's obligations under the agreement, including the obligation to repay the plaintiffs - the plaintiffs commenced proceedings to enforce the guarantee - Qaqish denied the money received by ProMEQ was a loan, and said it was an investment in property developments being undertaken by ProMEQ - he also claimed he did not know what he was signing and did not have an opportunity to seek legal advice before signing it, and that the loan agreement was unfair and should be set aside under the *Contracts Review Act 1980* (NSW) or the unfair contract provisions of the *Australian Consumer Law* - held: the plaintiffs bore the onus of proof in relation to their claim to enforce the guarantee - the money paid by the plaintiffs to ProMEQ was a loan pursuant to the terms of an agreement - Qaqish bore the onus of proof in relation to his claim that the contract was an unfair contract - the general principles as to the formation of a contract apply to a contract of guarantee - the advance of money in response to a request is sufficient consideration for a guarantee - Qaqish had guaranteed ProMEQ's performance of the loan agreement, including the obligation to repay the plaintiffs - the Court rejected Qaqish's evidence that he was, as a matter of fact, mistaken about the terms of the loan agreement - in any event, he would not have been entitled to rely on a defence of *non est factum*, as this defence is available only to those who are unable to read owing to blindness or illiteracy and who must rely on others for advice as to what they are signing, or those who through no fault of their own are unable to have any understanding of the purport of a particular document - Qaqish was an intelligent, well-educated man whose employment responsibilities had included contractual management and negotiation - the loan agreement did not have any connection with NSW and the *Contracts Review Act 1980* (NSW) therefore did not apply - the unfair contract provisions of the *Australian Consumer Law* are not intended to set aside the fundamental principle of freedom of contract - the inclusion of a guarantee did not cause a significant imbalance of the parties' rights and obligations under the loan agreement - the terms of the loan agreement were not unfair and were enforceable against Qaqish - any agreement to vary the interest rate from that specified in the loan agreement was conditional on repayment in full by a particular date, and then another particular date, and neither repayment had occurred - judgment for the plaintiffs in the amount of \$450,000 together with interest.

[Abdel-Messih atf The Abdel-Messih Superannuation Fund](#)

[From Benchmark Monday, 26 August 2024]

Benchmark

INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Manchester Ship Canal Co v United Utilities Water Ltd (UKSC) - Manchester Ship Canal company was not barred from bringing a common law damages claim for trespass and nuisance against a public utilities company that discharged raw, untreated and foul sewage into the canal from outfalls lawfully maintained by the sewerage authority

Summaries With Link (Five Minute Read)

Manchester Ship Canal Co v United Utilities Water Ltd [2024] UKSC 22

Supreme Court of the United Kingdom

Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Burrows, Lord Stephens, Lady Rose, Lord Richards

In a declaratory ruling, the Supreme Court was asked to decide whether the Manchester Ship Canal Company could bring a claim against the statutory sewerage authority for discharges of foul sewage into the canal. The defendant, United Utilities, was the statutory sewerage authority for North West England and owned about 100 outfalls from which treated sewage was discharged into the canal. However, sometimes untreated sewage was discharged into the canal as well. No allegation was made that the discharge of untreated sewage was caused by negligence. However, it could have been avoided through improved infrastructure. The High Court, upheld by the Court of Appeal, found that a canal owner could not bring a claim based on nuisance or trespass against a sewerage operator unless the discharge was the result of negligence or deliberate wrongdoing. The Supreme Court unanimously allowed the Canal Company's appeal. Sewerage is regulated by the *Water Industry Act 1991* and the Supreme Court held that nothing in the legislation permitted or authorised a sewerage authority to discharge foul water through outfalls. Inasmuch as the statute did not authorise the activity, common law remedies were available. The Court rejected the defence that the only way to avoid fouling the canal would be to construct sewerage infrastructure and that was a matter for Parliament. The Court found that there was nothing in the legislation indicating that Parliament intended to extinguish common law rights of action. While an injunction against further discharge presented questions relating to the process of regulatory approval for capital expenditures by the sewerage authority, that did not mean that common law-based awards for damages for invasion of property rights were precluded.

[Manchester Ship Canal Co](#)

Poem for Friday

i carry your heart with me

by e.e. cummings (1894-1962)

i carry your heart with me (i carry it in
my heart) i am never without it (anywhere
i go you go, my dear; and whatever is done
by only me is your doing, my darling)

i fear

no fate (for you are my fate, my sweet) i want
no world (for beautiful you are my world, my true)
and it's you are whatever a moon has always meant
and whatever a sun will always sing is you

here is the deepest secret nobody knows
(here is the root of the root and the bud of the bud
and the sky of the sky of a tree called life; which grows
higher than soul can hope or mind can hide)
and this is the wonder that's keeping the stars apart

i carry your heart (i carry it in my heart)

Edward Estlin Cummings (e.e. cummings), an American poet, essayist and playwright was born on 14 October 1894 in Cambridge Massachusetts. His parents encouraged his creativity, and included in their circle of friends artists, philosophers and writers. Cummings's father was a professor at Harvard, and later a minister of the Unitarian church. Cummings wrote poetry from the age of 8. Cummings was an ambulance driver during the first world war. He was interned in a camp in Normandy in the first world war, for having expressed anti-war sentiments. During his life he wrote about 2900 poems. He returned to Paris many times throughout his life. It has been written of Cummings that "No one else has ever made avant-garde, experimental poems so attractive to the general and the special reader," and "Cummings is a daringly original poet, with more vitality and more sheer, uncompromising talent than any other living American writer."

Read by **Colin McPhillamy**, actor and playwright. Colin was born in London to Australian parents. He trained at the Royal Central School of Speech and Drama in London. In the



UK he worked in the West End, at the Royal National Theatre for five seasons, and extensively in British regional theatre. In the USA he has appeared on Broadway, Off-Broadway and at regional centres across the country. Colin has acted in Australia, China, New Zealand, and across Europe. Colin is married to Alan Conolly's cousin Patricia Conolly, the renowned actor and stage actress: https://en.wikipedia.org/wiki/Patricia_Conolly and <https://trove.nla.gov.au/newspaper/article/47250992>.

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