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Benchmark

Friday, 12 July 2024

Weekly Civil Law Review

Selected from our Daily Bulletins covering Insurance, Banking, Construction & Government

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Executive Summary (One Minute Read)

Casey v DePuy International Ltd (No 4) (FCA) - expert determined quantum of compensation for a class member after settlement of class action - Court dismissed application the expert had committed errors of law (I B)

EnerMech Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd (NSWCA) - the *Building and Construction Industry Security of Payment Act 1999* (NSW) does not require that a payment claim be made only for "construction work" (I B C)

Lahoud v Willoughby City Council (NSWCA) - Local Planning Panel had not erred in granting development consent for the adaptive reuse of an existing commercial building, and permitting the height restrictions in the LEP to be exceeded (I B C)

AM Darlinghurst Investment Pty Ltd as trustee for AM Darlinghurst Investment Trust v Growthbuilt Pty Limited (NSWSC) - adjudicator under the *Building and Construction Industry Security of Payment Act 1999* (NSW) had not committed jurisdictional error (I B C)

Philomina Afriyie v Dyvest Health Care Pty Ltd trading as Rickard Road Medical Centre (NSWSC) - Court approved settlement of medical negligence litigation where it was satisfied settlement was in the interests of the plaintiff's infant children (I B)

Malayan Banking Berhad v Vietnam Industrial Investments Ltd (NSWSC) - Court made a gross sum order on an indemnity basis after a successful application to wind a company up in insolvency (I B)

AR Conolly & Company Lawyers
Level 29 Chifley Tower, 2 Chifley Square, Sydney NSW 2000
Phone: 02 9159 0777 Fax: 02 9159 0778
www.arconolly.com.au

Ayshan v Abualadas (No 2) (NSWSC) - Court determined wording of declaration of constructive trust for sale (B I)

Re Emerging Energy Solutions Group Pty Ltd (No 2) (VSC) - application to set aside statutory demand failed as the Court concluded the amount claimed was a debt and not merely a claim for unliquidated damages (I B C)

Sawyer v Steeplechase Pty Ltd (QSC) - subcontractor employer liable for concreter's injury after construction site accident, but head contractor did not owe a duty of are in the circumstances (I B C)

Fuller v Australian Capital Territory (ACTCA) - primary judge in medical negligence action had correctly found facts, but had been wrong to conclude that those facts did not establish negligence (I B)

HABEAS CANEM

The scent on the breeze

Summaries With Link (Five Minute Read)

Casey v DePuy International Ltd (No 4) [2024] FCA 724
Federal Court of Australia
Markovic J
Contracts - a plaintiff commenced a class action under Pt IVA of the *Federal Court of Australia Act 1976* (Cth), claiming a prosthesis designed to be fitted during total knee replacement surgery was not fit for purpose nor of merchantable quality - the proceedings settled - the settlement agreement did not provide for the payment of a global sum to group members but provided for a mechanism by which there could be an assessment of the eligibility of group members to receive compensation and, if eligible, a mechanism for the determination of the compensation payable by the respondents - one group member held to be entitled to compensation could not agree the quantum of compensation with the DePuy, and quantum was therefore determined in an Independent Assessment by an Independent Counsel pursuant to the settlement agreement - that group member now sought a declaration that the Independent Assessment contained errors of law - held: the jurisdiction of the Court to hear this application had been put beyond doubt by an earlier order in the proceedings under s33V(2) of the *Federal Court of Australia Act* that DePuy pay any amount determined under the protocol established by the settlement agreement - the protocol included a party's right to challenge an assessment by an Independent Counsel, limited to an error of law - where the right to appoint Independent Counsel and the right to review his or her decision for errors of law arises under a contract in the nature of the protocol, the nature of the errors that must be established are: a failure by Independent Counsel to perform the task contractually conferred on him or her or the carrying out of the task conferred by the protocol in a way not within the contractual contemplation of the parties - here, the Independent Counsel had not made an error of law by determining the category of claim - the Independent Counsel was acting as an expert (rather than an arbitrator) - an expert is not required to afford procedural fairness unless such a requirement is imposed by the terms of the contract governing the expert's appointment - there was no such requirement here - the Court was not satisfied the Independent Counsel applied the wrong test of causation - other grounds also failed - application dismissed.
Casey (I B)
[From Benchmark Monday, 8 July 2024]

EnerMech Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd [2024] NSWCA 162
Court of Appeal of New South Wales
Meagher JA, Basten, & Griffiths AJJA
Security of Payments - EnerMech contracted with the respondents to supply electrical works for part of the WestConnex project - EnerMech issued a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) for more than $10million - the respondents served a payments schedule stating that nothing was payable - an adjudicator found in favour of EnerMech - the respondents commenced judicial review proceedings - the primary judge quashed the adjudication - EnerMech appealed - held: in the 24 years since the

Act commenced, there has been considerable judicial analysis, both of the specific issue as to the nature of a payment claim, and as to principles governing the construction of the Act - as a matter of construction, a payment claim must be for an amount of money, and the claim must assert that the amount is for work done, goods supplied or services rendered, under a construction contract - understanding the objects of the, its structure and its spare language, there was little scope for implying unstated conditions as essential to the validity of a payment claim or a payment schedule - the Act therefore does not require that a payment claim be made only for "construction work" - under s25(4)(a)(ii) of the Act, the adjudicator's understanding of the construction contract, even if legally erroneous, cannot be challenged on a claim to enforce an adjudication certificate; nor, without more, can it be so challenged on judicial review. - whatever conditions on the entitlement of EnerMech arose from the correct reading of the contract and the Act were properly matters for the adjudicator - appeal allowed.
View Decision (I B C)
[From Benchmark Friday, 12 July 2024]

Lahoud v Willoughby City Council [2024] NSWCA 163
Court of Appeal of New South Wales
Meagher & Leeming JJA, & Preston CJ of LEC
Planning law - Willoughby Local Planning Panel, on behalf of Willoughby City Council, granted development consent for the adaptive reuse of an existing commercial building at Northbridge - the development included erecting an additional level (Level 4) on the existing building to provide two 3-bedroom apartments, which increased the height of the building to 18.08m - under cl 4.3 of *Willoughby Local Environmental Plan 2012*, the maximum height of a building on the land was 14m - the Panel granted a written request under cl4.6 of the Plan that sought to justify the contravention of the height standard - Lahoud brought judicial review proceedings in the Land and Environment Court - the primary judge dismissed the proceedings - Lahoud appealed - held: the appellant misunderstood the height standards - once the incorrectness the appellant's assumptions about the height standards was appreciated, each of the height standard grounds of appeal could be seen to be unfounded - the Panel did not breach cl4.6(4) by granting development consent to the development for which consent was sought except for the specified parts of Level 4 of the building which were required by the conditions to be redesigned, relocated or deleted - that development, except for the specified parts which were required to be redesigned, relocated or deleted, did contravene the height standard, but the Panel was satisfied that the applicant's written request had adequately addressed the matters required to be demonstrated - on a proper construction of the development consent, the development to which the Panel granted development consent was the development for which the consent was sought, except for the parts of Level 4 which were required by the conditions of consent to be redesigned, relocated or deleted, and after that redesign, relocation or deletion of those parts of Level 4 had been effected - the question of whether the building as proposed to be redeveloped will be a building that has an active street frontage within the statutory description in cl 6.7(5) was not a jurisdictional fact, but was rather a question for the Panel to decide - the Panel's finding that the building has an active street frontage did not involve any

jurisdictional error - other errors not established - appeal dismissed.
View Decision (I B C)
[From Benchmark Friday, 12 July 2024]

AM Darlinghurst Investment Pty Ltd as trustee for AM Darlinghurst Investment Trust v Growthbuilt Pty Limited [2024] NSWSC 825
Supreme Court of New South Wales
Ball J
Security of payments - AM Darlinghurst contracted Growthbuilt to design and construct the redevelopment of three adjacent buildings for a lump sum of $73.6 million - Growthbuilt served a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) for over $18million - AM Darlinghurst served a payment schedule stating a negative amount of over $6million, due to claims AM Darlinghurst made for liquidated damages arising from delays in completing the work under the construction contract - an adjudicator under the Act ruled that nearly $6million was payable to Growthbuilt - AM Darlinghurst sought judicial review of the arbitrator's decision - held: an adjudicator must comply with the timetable set out in s21 of the Act and is to consider only the matters set out in s22(2) - but this does not mean that the adjudicator must give any particular weight to any of these matters - the adjudicator is required to observe the rules of natural justice, which includes an obligation not to decide an application on a basis not raised by the parties, and which could not reasonably have been anticipated by the parties, without first inviting submissions on that basis - the adjudicator had not erred, when considering a particular report, in concluding that it was not practical in the time available to separate those parts of the report that depended on without prejudice communications from those that did not, and therefore deciding to give the report no weight - even assuming that the adjudicator's failure to refer to a particular person's evidence in relation to each variation was an oversight in drafting her report, that was not jurisdictional error, and the most that could be said is that the adjudicator did not specifically refer to evidence that she had largely rejected in a related context - the adjudicator had not relied on grounds not advanced by Growthbuilt in granting an extension of time - it had been within jurisdiction for the adjudicator to accept Growthbuilt's submission that AM Darlinghurst was not relevantly entitled to liquidated damages, even if that submission had no merit - application for judicial review dismissed.
View Decision (I B C)
[From Benchmark Monday, 8 July 2024]

Philomina Afriyie v Dyvest Health Care Pty Ltd trading as Rickard Road Medical Centre [2024] NSWSC 826
Supreme Court of New South Wales
Medical negligence - the plaintiff claimed damages for herself and her infant children as the result of the death of her partner at Bankstown Hospital - the husband had suffered a severe non-ischemic cardiomyopathy, in circumstances where he had no prior disclosed history of cardiac problem, had never sought treatment from his GPs for such a condition, had never been diagnosed to be suffering it, and it was not identified when he presented at the Hospital

suffering symptoms of influenza - the proceedings against several defendants had been resolved in favour of those defendants - the remaining defendants (two GPs and the Hospital) reached a settlement agreement with the plaintiff at mediation - the plaintiff now applied under s76 of the *Civil Procedure Act 2005* (NSW) for approval of the settlement - held: the Court had had regarding to a confidential advice of Counsel and evidence from the solicitor for the plaintiff, and others - the Court was satisfied that it is unlikely that a more favourable judgment will result for the infant children if the Court's approval were withheld - The experts had directly competing views about causation, breach, liability, and quantum - the issues raised complex and problematic, given the lay evidence that, when he died, the husband was regarded to have been a strong and robust person with no health problems, and, even on the day he was taken to Hospital, he had intended to go to work, with the result that his sudden death came as a shock - even if he had survived, there were real issues about the extent to which the husband would have been able to provide his children with ongoing financial support, because of his significant cardiac problems - taking proper account of the legal advice which the plaintiff had received and which had to be given significant weight, the proposed settlement should be approved as beneficial for the affected children.
View Decision (I B)
[From Benchmark Tuesday, 9 July 2024]

Malayan Banking Berhad v Vietnam Industrial Investments Ltd [2024] NSWSC 830
Supreme Court of New South Wales
McGrath J
Gross sum costs orders - the Court had previously ordered that Vietnam Industrial Investments Ltdbe wound up in insolvency on the application of Malayan Banking Berhad, and that liquidators be appointed - Malayan Banking now applied pursuant to liberty previously granted that the liquidators reimburse it out of the assets of Vietnam Industrial Investments for the costs of the application on an indemnity basis by way of a gross sum order - the liquidators neither consented nor opposed the application - held: the power conferred by s98(4) of the *Civil Procedure Act 2005* (NSW) to make a gross sum costs order is not confined, and may be exercised whenever the circumstances warrant, and it may appropriately be exercised where the assessment of costs would be protracted and expensive, and in particular if it appears that the party obliged to pay the costs would not be able to meet a liability of the order likely to result from the assessment - the Court must be confident that the approach taken to estimate costs is logical, fair and reasonable - a gross sum assessment, by its very nature, does not envisage that a process similar to that involved in a traditional taxation or assessment of costs should take place, and the amount may be fixed broadly - nevertheless the power to award a gross sum must be exercised judicially, and after giving the parties an adequate opportunity to make submissions - because Vietnam Industrial had been wound up in insolvency it was appropriate to order costs as a gross sum rather than as assessed costs - the costs application was supported by an affidavit of a solicitor admitted to practice in the Court for 29 years and who had practised solely in the area of legal costing for 22 years - significant weight in the exercise of the Court's discretion should be placed on Malayan Banking's contractual entitlement to the

payment of its costs on an indemnity basis - it had been unreasonable in the sense described in the authorities for Vietnam Industrial to oppose the winding up application by seeking to delay the hearing, where it had no evidence capable of rebutting the presumption of insolvency, by reference to a speculative restructuring - gross sum of about $266,000 awarded on an indemnity basis.
View Decision (I B)
[From Benchmark Wednesday, 10 July 2024]

Ayshan v Abualadas (No 2) [2024] NSWSC 824
Supreme Court of New South Wales
Parker J
Constructive trusts - two couples (being two sisters and their respective spouses) were engaged in the purchase and development of a property which involved construction of a duplex building and the subdivision of the property into two lots, one containing each duplex - one sister separated from her spouse and a dispute arose with the two sisters and the remaining spouse on one side, and the separated spouse on the other side - the couple that remained together and the separated sister sought orders compelling the separated spouse to cooperate in separating the parties' ownership and mortgage obligations between the two subdivided lots - the separated spouse resisted this and sought the appointment of a trustee for sale instead - the Court had held that the separated sister's claim for a common intention constructive trust failed, and her spouse's cross-claim for recognition of a failed joint endeavour constructive trust succeeded - the parties agreed that, given those conclusions, the Court should declare a constructive trust for sale over the properties in the hands of certain parties, coupled with an immediate order replacing them with an independent trustee to carry out the sale and divide the proceeds (see Benchmark 5 June 2024) - the Court now determined the form of final relief - held: the wording of the declaration of constructive trust for sale should be based on that proposed by Deane J in *Muschinksi v Dodds* (1985) 160 CLR 583, and must relevantly specify four elements: (1) the date from which the trust is to be imposed; (2) the use of the sale proceeds to repay debts secured on the property (and the expenses of sale and any other outstanding liabilities of the parties associated with the joint endeavour); (3) the repayment of the parties' contributions to the joint endeavour; and (4) payment of any surplus (after deduction of the trustee's expenses) to the parties to the joint endeavour in equal shares - as the parties had not addressed the proper date, the Court used the date of final orders - the existence of liabilities at law upon the breakdown of the joint endeavour was a reason for equitable intervention, not an obstacle to it - any liability for capital gains tax on the sale of the property must be seen as equivalent to a contribution to the joint endeavour, and should be discharged out of the sale proceeds - the bad blood between the parties required the appointment of an independent trustee to effect the sale and wind up the trust's affairs - equal division between couples ordered, and the Court did not consider it necessary to determine the rights *inter se* of each couple.
View Decision (B I)
[From Benchmark Friday, 12 July 2024]

Re Emerging Energy Solutions Group Pty Ltd (No 2) [2024] VSC 393
Supreme Court of Victoria
Barrett AsJ
Corporations law - the plaintiff and defendant entered into eight contracts for the forward sale of carbon credits issued under a NS trading scheme pursuant to the *Climate Change Response Act 2002* (NZ) - the plaintiff defaulted, and the defendant terminated the contracts, and claimed amounts due under the contracts in the event of termination - in due course, the defendant served a statutory demand for nearly AUD$25million - the plaintiff applied to set the statutory demand aside under s459G of the *Corporations Act 2001* (Cth), on the basis that the amounts claimed were not debts but rather claims for unliquidated damages, and therefore not properly the subject of a statutory demand - held: the only issue was the proper characterisation of the claim in the demand - a number of authorities that described the difference between a liquidated and unliquidated claim - the ordinary meaning of "liquidated damages" is a sum fixed by the parties to a contract as a genuine pre-estimate of damage in the event of breach, whether as a pre-determined lump sum, or by means of a specified calculation or scale of charges or other positive data - if the amount owing may only be determined by the Court assessing damages in accordance with general principles, then the claim will not be a debt - however, if a liquidated sum may be determined by a mechanism set out in the contract, then the claim will properly be characterised as a debt if that mechanism is employed and the amount owing is determined - the Court was satisfied that the contract articulated a mechanism for determination of the amount owing, and that that mechanism had been employed, and the figure reached and stated in the statutory demand was a debt owing under the contract - proceedings dismissed.
Re Emerging Energy Solutions Group Pty Ltd (No 2) (I B C)
[From Benchmark Wednesday, 10 July 2024]

Sawyer v Steeplechase Pty Ltd [2024] QSC 142
Supreme Court of Queensland
Crowley J
Negligence - the appellant worked as a concreter for a concreting business - he claimed he injured his lower back when bending and reaching while holding a mesh sheet as he and his co-worker attempted to position it in place for a slab foundation at a residential property - he also claimed he suffered aggravation of a pre-existing depressive condition, as a consequence of his physical injury - he sued his employer and the head contractor for the project in negligence - held: the common law does not impose a duty of care on principals for the benefit of independent contractors engaged by them of the kind which they owe to their employees - however, in some circumstances, a principal will come under a duty to use reasonable care to ensure that a system of work for one or more independent contractors is safe - the Court did not consider that circumstances existed such that a duty of care of the kind and scope as pleaded by the plaintiff should be imputed against the head contractor - had the Court been required to determine contribution as between the defendants as joint tortfeasors, it would have apportioned the head contractor's liability as 10% - the employing concreter sub-contractor had

breached its duty of care - this breach of duty was a necessary condition of the occurrence of each of these injuries - the employer was liable for the plaintiffs' injuries, damage, and loss - damages assessed at about $780,000.
Sawyer (I B C)
[From Benchmark Friday, 12 July 2024]

Fuller v Australian Capital Territory [2024] ACTCA 19
Supreme Court of the Australian Capital Territory
McCallum CJ, Baker, & Taylor JJ
Medical negligence - Fuller was administered spinal anaesthetic for the purposes of a planned caesarean section at The Canberra Hospital - during the procedure, the spinal needle being used to administer the anaesthetic broke into two pieces, with one piece remaining in the appellant's back, which was quickly surgically removed, and Fuller went on to successfully deliver her child that day via caesarean section under general anaesthetic - Fuller alleged she suffered psychological, neurological, and physical injury as a result of the failed attempt to administer the spinal anaesthetic - the primary judge dismissed the claim, finding negligence had not been established - the appellant appealed - held: this was an appeal in the nature of a rehearing, in which the appellate court was required to give the judgment which it considered ought to have been given in the primary proceedings, and in doing so, respect the limitations that exist where the rehearing is conducted substantially or wholly on the record - an appellate court will generally be in as good a position as the primary judge to decide on the proper inferences to be drawn from the facts, and, although it will give respect and weight to the conclusion of the primary judge this respect, having reached its own conclusion it will not shrink from giving effect to it - the appellant had not established that the primary judge erred in his factual findings concerning the circumstances in which the spinal needle broke - however, accepting those factual findings, the primary judge should have found that the appellant had established negligence on the - both breach of duty and causation were established - appeal allowed, and proceedings remitted for an assessment of quantum.
Fuller (I B)
[From Benchmark Thursday, 11 July 2024]

Executive Summary and (One Minute Read)

Moody v Netchoice (SCOTUS) - Lower court decisions upholding State statutes prohibiting social media companies from moderating content posted by third parties were reversed for failure to conduct proper First Amendment analysis

Summaries With Link (Five Minute Read)

Moody v Netchoice 603 US ___ (2024)
Supreme Court of the United States
The States of Florida and Texas enacted legislation that prohibited internet platforms from moderating third-party content based on content. The Supreme Court found serious First Amendment implications that the lower courts failed to properly consider. The cases were remanded to the courts below. The Court cited to *Miami Herald Publishing Co v Tornillo*, 418 US 241 (1974), where it was held that a Florida statute requiring newspapers to offer a right of reply violated the First Amendment because it consisted of compelled speech. Compelled speech can violate the First Amendment as much as suppression of speech. The Court said that government cannot meddle in speech by claiming that it is improving the marketplace of ideas. Here, the Court concluded that states were not likely to succeed in prohibiting the platforms from enforcing the platforms' own content moderation rules. The Court said that the States' attempt to better balance the mix of viewpoints on the internet by restricting content moderation amounted to an interference with speech decisions made by the private platforms. The Court added that a State cannot prohibit speech to rebalance the speech market. Inasmuch as the content moderation practices amounted to speech decisions by the platforms, the government was not free to enact laws that infringed those private speech rights.
Moody

Poem for Friday

Iceland

By Jonas Hallgrimsson (1807-1845)

Charming and fair is the land,
and snow-white the peaks of the jokuls [glaciers],
Cloudless and blue is the sky,
the ocean is shimmering bright,
But high on the lave fields, where
still Osar river is flowing
Down into Almanna gorge,
Althing no longer is held,
Now Snorri's booth serves as a sheepfold,
the ling upon Logberg the sacred
Is blue with berries every year,
for children's and ravens' delight.
Oh, ye juvenile host
and full-grown manhood of Iceland!
Thus is our forefathers' fame
forgotten and dormant withal.

Jonas Hallgrimsson was born in Iceland on 16 November, 1807. He is a revered figure in Icelandic literature, writing in the Romantic style. His love of the Icelandic people and country side and pride in the national identity comes through his poetry. He was a promoter of the Icelandic Independence Movement. He was employed for a time by the sheriff of Reykjavik as a clerk. He studied law at the University of Copenhagen. He also worked as a defence lawyer. He founded the Icelandic periodical Fjolnir first published in 1835. He died on 26 May 1845, after slipping on stairs and breaking his leg, the previous day. He died of blood poisoning aged 37 years. His birthday each year is recognised as the Day of the Icelandic Language.

Ég bið að heilsa, words by Jónas Hallgrímsson, composition by Ingi T. Lárusson
https://www.youtube.com/watch?v=6OqbfGSJDUc

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