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LAWYERS

Benchmark

Friday, 29 March 2024

Weekly Civil Law Review

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

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Executive Summary (One Minute Read)

Ramadan v ACN 098 408 176 Pty Ltd & Anor (No 3) (SASCA) - trial judge had erred in reducing damages by half due to a failure of the appellant to seek contribution from her husband (I B)

Adelaide Marble Specialists Pty Ltd v Ragunath & Anor (SASCA) - builder refused leave to appeal from a decision of a single judge dismissing an appeal from a Magistrate in a building dispute (I B C)

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 (B I)

Trinh v Medical Council of New South Wales (NSWCA) - Executive Officer of the Medical Council had validly delegated power to a disciplinary panel (I B)

Jeske v Rowe & Anor (NSWSC) - proceedings transferred from Supreme Court to District Court where one defendant would not agree not to seek special costs order if less than $500,000 damages were awarded (I B)

Canadian Solar Construction (Australia) Pty Ltd v Re Oakey Pty Ltd (QSC) - successful contractor in security of payments claim not entitled to rely on offer of compromise to obtain indemnity costs, as the letter accompanying the offer made it clear that the offeree had to compare apples and oranges, when comparing the result under the offer with the potential result after litigation (I B C)

Cai v Launceston City Council (TASSC) - Tribunal had not erred in law in affirming Council's decision to grant approval for a 4.5 to 5 star hotel including a restaurant, bar, function centre, wellness centre, day spa, and small unspecified retail use in Launceston (I B C)

HABEAS CANEM

The scent on the breeze

Summaries With Link (Five Minute Read)

Ramadan v ACN 098 408 176 Pty Ltd & Anor [2023] SASCA 91
Court of Appeal of South Australia
Livesey P, Doyle, & Bleby JJ
Civil procedure - the appellant had commenced proceedings in equity and under the *Australian Securities and Investments Commission Act 2001* (Cth), alleging the respondents had engaged in unconscionable conduct in connection her entry into a loan with her husband in 2007 for $300,000 - the appellant was 67 years old, and could not understand English, and was illiterate even in her native Arabic - the applicant was successful at first instance, but was only awarded half of the repayments she had made, on the basis that she had unreasonably failed to seek equitable contribution from her husband - the primary judge also held that the appellant sustained no loss of her claimed survivorship interest in the family home, as the transfer of the property from the appellant to her grandson was not at arm's-length, and she continued to reside in the property rent free following the sale - the appellant appealed - held: the respondents' pleadings did not raise a failure to mitigate, let alone a failure to seek to enforce a right to equitable contribution - the trial proceeded on the basis that the appellant was not put on notice of any contention that her damages might be reduced as a consequence of her failure to bring a claim against her husband - the reduction in the appellant's award of damages on a basis not argued by the parties contravened the fundamental principle that no one ought to be put to loss without having a proper opportunity of meeting the case against him or her, which requires that pleadings should state with sufficient clearness the case of the party whose averments they are - it had not been open to the trial judge to entertain this issue as a basis to reduce the award, whether on the basis that it represented a failure to mitigate or otherwise - the appellant succeeded on this ground - however, the appellant's claim for the loss of the full value of the property failed - this claim ignored her own conduct in selling the proprietary interest in the property for less than its market value before her husband died - while the respondents may have been responsible for the appellant incurring debts, and ultimately the need to sell the property, they were not responsible for the appellant's decision to sell for less than market value - this ground of appeal dismissed - appeal allowed, and damages increased to the full value of the repayments the appellant had made.
Ramadan (I B)
[From Benchmark Tuesday, 26 March 2024]

Adelaide Marble Specialists Pty Ltd v Ragunath & Anor [2024] SASCA 23
Court of Appeal of South Australia
Kourakis CJ, Doyle, & Bleby JJA
Building contracts - owners retained a builder to carry out some residential building work - disputes arose, and the owners sued the builder in the Magistrates Court seeking damages of about $20,000 for defective and incomplete work - the Magistrate largely accepted the owners' case - the builder's appeal to the Supreme Court was unsuccessful - the primary judge held that the builder had not been taken by surprise by the owners' case regarding marble that had been

installed that had been more expensive than the marble called for by the contract - the plaintiffs' case had always been the measure of damages was the quoted cost, and there was no suggestion the more expensive marble builder provided a proper basis to assess the cost of that aspect of the damages under the varied contract - the builder sought leave to appeal - held: in deciding whether to grant leave to appeal, the Court acts in the interests of justice and by reference to three inter-related questions: whether the decision is attended by sufficient doubt to warrant its reconsideration on appeal; whether the decision raises an issue of principle or general importance; and whether allowing the decision to stand would work a substantial injustice to the applicant - on the reasons of the Magistrate and single judge, and the parties' submissions, the appeal did not appear to be a strong one - the appeal did not raise any issue of general principle or importance, which was significant in the context of an application for leave to bring a second appeal - the principles governing the sufficiency of proof on issues of damages are well settled, and were not in dispute - it was also relevant that the Magistrate based the relevant component of his damages assessment on a figure taken from a quote provided by the builder - the interests of proportionality and finality weighed heavily, given the time and expense associated with these proceedings had already far exceeded the amounts at stake, and, as the Magistrate had observed, the parties had both been represented throughout, and had contested every point, and had had the benefit of the thorough consideration and reasons of the Magistrate and single judge - leave to appeal refused.
Adelaide Marble Specialists Pty Ltd (I B C)
[From Benchmark Wednesday, 27 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 (B I)
[From Benchmark Thursday, 28 March 2024]

Trinh v Medical Council of New South Wales [2024] NSWCA 58
Court of Appeal of New South Wales
Mitchelmore JA; Basten, & Griffiths AJJA
Administrative law - the Medical Council of NSW received two complaints regarding the applicant, a registered medical practitioner - the Council's Executive Officer appointed a panel - the panel resolved to suspend the applicant's registration pursuant to s150 of the *Health Practitioner Regulation National Law (NSW) 2009* (NSW) - the applicant both sought judicial review and sought to appeal from the Tribunal's decision - there was no dispute that the Council had power to delegate to the Executive Officer, but, the applicant submitted the Council could not delegate in a way which permitted the Executive Officer to subdelegate the exercise of the power to the Panel - held: the Council conferred its functions under s150 and s150A to a person or group of persons, as was expressly permitted by the National Law - what the Council placed in the hands of its Executive Officer was the power of determining the individual composition of the group (or panel) when occasions arose requiring consideration of the exercise of the relevant functions - the terms of the delegations reflected the nature of the functions being delegated, the exercise of which could be required with some frequency and on short notice, and the role of the Executive Officer in administering the affairs of the Council - there was no complaint that the members of the panel were not appropriately qualified - the challenge to the validity of the delegations must be rejected - the contention that there was some incoherence between the step taken by a panel in imposing a suspension and the failure of the Council to refer the complaint to the Tribunal was misconceived - further, he state of mind of the panel was not that of the Council, and the nature and purpose of their respective functions differed - the summons seeking judicial review should be dismissed - the appeal should also be dismissed.
View Decision (I B)
[From Benchmark Wednesday, 27 March 2024]

Jeske v Rowe & Anor [2024] NSWSC 242
Supreme Court of New South Wales
Weinstein J

Medical negligence - the plaintiff commenced medical negligence proceedings in the Supreme Court - the plaintiff sought that the matter be transferred to the District Court pursuant to s146(1) of the *Civil Procedure Act 2005* (NSW) - s146(1)(b) provides that proceedings in the Supreme Court on a claim for damages arising from personal injury or death are to be transferred under that section unless the Supreme Court is satisfied that the amount to be awarded to the plaintiff if successful is likely to exceed the jurisdictional limit of the District Court, or that there is some other sufficient reason for hearing the proceedings in the Supreme Court - it was common ground that the amount likely to be awarded to the plaintiff, if successful, would not exceed the jurisdictional limit of the District Court - the first defendant said there was other sufficient reason to keep the proceedings in the Supreme Court, namely the ability for the matter to be case managed in the Professional Negligence List, in circumstances where it was agreed that the issues to be decided ultimately by the Court would be difficult, in particular breach of duty and causation - the second defendant neither consented to nor opposed the transfer - held: it was likely that a hearing date would be obtained either in the District Court or the Supreme Court at about the same time - the first defendant had agreed not to seek an order under r42.34 of the *Uniform Civil Procedure Rules 2005* (NSW) in the event that the plaintiff was awarded damages under $500,000 - this would have the effect that the plaintiff would not be prejudiced as to costs if the matter remained in the Supreme Court - however, the second defendant had not agreed not to seek an order under r42.34 - this in itself was reason enough to find that there was no sufficient reason for hearing the proceedings in the Supreme Court - proceedings transferred to District Court.
View Decision (I B)
[From Benchmark Tuesday, 26 March 2024]

Canadian Solar Construction (Australia) Pty Ltd v Re Oakey Pty Ltd [2024] QSC 27
Supreme Court of Queensland
Freeburn J
Cost in security of payment cases - a contractor served a payment claim under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) on a principal for about $4 million by email - the email bounced from the address of its main recipient (the principal's representative), although it was successfully delivered to representatives of the project manager - the sender did not notice the notification that his email had bounced - the principal remained unaware of the email and did not serve a payment schedule - the contractor sued, contending that the principal was liable to pay the amount of the claim - the Court had previously upheld the service of the payment claim and ordered the principal to pay about $4million (see Benchmark 8 March 2024) - the Court now considered costs - the contractor sought to rely on an offer of compromise it had served - held: the critical issue was the nature of the offer made by the plaintiff, that is, if the offer had been accepted, and the defendant paid about $3million to the plaintiff, what would be the effect of that acceptance and payment? - in some cases, an offer made is in effect a standalone offer and there is no need to consider the accompanying letter, and, in such cases, the letter from a solicitor accompanying an offer may merely explain the constituent elements of the offer - in other cases, such as this case, the letter from a solicitor accompanying an offer

must be read with the offer - the letter should be considered, first, in making the comparison which r360 of the *Uniform Civil Procedure Rules 1999* (Qld) requires (a litigated result that is no less favourable than the offer), and, second, in deciding whether the principal had shown whether another order for costs is appropriate - no evidence explained why the court's decision of an "interim" $4 million gave a less favourable result than the offer which prescribed adjusted rights under the payment claim, with a payment of $3million now, and with a reservation of rights in relation to the balance - the Court was not satisfied that the offer was "no less favourable" than the Court's decision - in any event, the letter and its reservation of rights placed the principal in a position where it had to compare apples and oranges - the evidence did not establish that the principal was acting unreasonably to chance its arm in the litigation - the contractor awarded its costs on the standard basis only.
Canadian Solar Construction (Australia) Pty Ltd (I B C)
[From Benchmark Tuesday, 26 March 2024]

Cai v Launceston City Council [2024] TASSC 10
Supreme Court of Tasmania
Estcourt J
Administrative law - Launceston City Council granted a permit to the second respondent for the use and development of a hotel in Launceston - the permit described the approved use as visitor accommodation including associated restaurant, function centre, wellness centre, retail, and bars - the proposed use and development as for a 4.5-to-5-star hotel which would cost in the vicinity of $50million to develop, and the designs for the hotel included a restaurant, bar, function centre, wellness centre, day spa, and small unspecified retail use - Council had rejected a previous proposal by the second defendant on the grounds that it did not satisfy the relevant clauses of the *Launceston Interim Planning Scheme 2015* because it was not compatible with the streetscape and character of the surrounding area - the Tasmanian Civil and Administrative Tribunal affirmed Council' decision to grant the permit - the appellant appealed on questions of law under s136 of the *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) - held: the Tribunal did not err in law by finding that, for a use to be "subservient", it must serve the primary use, and by failing to find that a subservient use also needed to serve in a subordinate or secondary capacity to the primary use - the ordinary and grammatical meaning of the words "subservient part" did not suggest such a test - the Tribunal also did not err in law in finding that the phrase "directly associated with, and which are a subservient part" required only that the uses other than the visitor accommodation component (that is, the retail, restaurant, conference facility, and bars described as the "ancillary uses") be directly connected with and serve, contribute to, or promote the visitor accommodation use - the Tribunal did not take irrelevant considerations into account - the Tribunal did not err in law by finding that an unspecified retail use could be approved as a use directly associated with and subservient to the proposed visitor accommodation use, and by treating the assessment of whether the proposed use fell within the operation of the relevant clause of the *Launceston Interim Planning Scheme* as a matter for enforcement - appeal dismissed.
Cai (I B C)

[From Benchmark Tuesday, 26 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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