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LAWYERS

Benchmark

Friday, 30 August 2024

Weekly Civil Law Review

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

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Executive Summary (One Minute Read)

FBV18 v Commonwealth of Australia (FCA) - Court approved settlement of negligence claim by infant held in immigration detention (B I)

Lowe v Certain Underwriters at Lloyd's of London Subscribing to Policy No ATCSI00100 (Costs) (FCA) - insured whose case had failed, but who had succeeded on one of the two issues run at trial, ordered to pay 50% of the insurers' costs (I B)

Manno Kingsway Pty Ltd as trustee for the Manno Kingsway Unit Trust v Rose (NSWSC) - Court upheld a loan agreement entered into as part of dealing regarding a property development (I B C)

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 (I B C)

Maragol v Berry Patch Preschool Kellyville Ridge Pty Ltd (NSWSC) - certain paragraphs struck out of statement of claim concerning liability of the State where a child had died at a childcare centre (I B)

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 (I B C)

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Summaries With Link (Five Minute Read)

FBV18 v Commonwealth of Australia [2024] FCA 947
Federal Court of Australia
Button J
Negligence - the second applicant and his family had been held in immigration detention on Christmas Island and Nauru, and then at various locations between Australia, Papua New Guinea and Nauru - the second applicant, through the first applicant (his father as litigation representative) commenced proceedings, alleging that he experienced significant diagnosed mental health disorders and that the treatment he received in off-shore detention was inadequate - this proceeding was one of approximately 50 similar proceedings which had been delayed by the Commonwealth's challenge to the Federal's Court's jurisdiction - the Hich Court had held that the Federal Court did have jurisdiction, subject to certain claims only able to be heard by the High Court, in *Minister v DLZ18* [2020] HCA 43; 270 CLR 372 - the parties then attended mediation and reached a settlement - the second applicant requested the Court approve the settlement (which was required as he was a person under a legal incapacity), and the Commonwealth sought a confidentiality order over the terms of settlement - held: in determining whether a settlement is in the best interests of a person, significant weight will be given to the opinions of the applicant's legal advisers - a Confidential Opinion of counsel described, in a clear, well-reasoned, and objective manner, why the proposed settlement was in the best interests of the second applicant - the proceeding already had a long procedural history, would take some time to proceed to trial, and, even assuming it proceeded expeditiously, the prospect of an appeal loomed large, as the case raised novel claims regarding the Commonwealth's duty of care - it was proposed that the settlement sum be managed by the Senior Master of the Supreme Court of Victoria, until the second applicant turned 18 - the Court accepted that most, if not all, of the proceedings in the cohort of similar cases would be mediated in the medium to long term, and that those mediations would be prejudiced if the terms of settlement were published - settlement approved, and confidentiality order made until further order.
FBV18 (B I)
[From Benchmark Tuesday, 27 August 2024]

Lowe v Certain Underwriters at Lloyd's of London Subscribing to Policy No ATCSI00100 (Costs) [2024] FCA 984
Federal Court of Australia
Jackman J
Costs in insurance cases - Lowe was a professional rugby league player in the NRL - he suffered a significant injury in a "crusher" tackle, with immediate left upper and lower limb numbness, and retired from professional rugby league - at the time of the injury, the NRL was subscribed to a Professional Sports Person Personal Accident and Sickness Insurance Policy - Lowe sued the insurers, seeking indemnity on the basis that his "Bodily Injury" was "Permanent hemiplegia" as defined by the Policy, and that his injury satisfied the definition of "Bodily Injury"

as being "caused by an Accident and solely and independently of any other cause" - Lowe's case failed because he lost on the first issue, although he succeeded on the second issue - the insurers now sought costs of the proceedings, whereas Lowe said the costs should be apportioned between the two issues - held: the two issues were substantially separate and are readily apportionable - a substantial portion of Lowe's lay evidence concerned the causation issue, and a substantial portion of the documentary evidence by way of reports and correspondence from medical practitioners, and importantly the argument concerning that evidence, was directed to the causation issue - the Court's broad impression was that about half of the costs which were incurred by the insurers related to the hemiplegia issue, and half related to the causation issue - Lowe to pay 50% of the insurers' costs on the ordinary basis.
Lowe (I B)
[From Benchmark Thursday, 29 August 2024]

Manno Kingsway Pty Ltd as trustee for the Manno Kingsway Unit Trust v Rose [2024] NSWSC 1065
Supreme Court of New South Wales
Campbell J
Contracts - Rose was an experienced property developer - Manassen was the sole director and shareholder of Manno Kingsway - Rose and Manassen had pursued several development projects together - Rose and Mr Manassen, through corporate entities, entered into an investor's agreement setting out the funding structure for on the basis of a developer/investor relationship for a development at Cronulla - the project was delayed, and it appeared Rose was in some financial distress, and Rose and Manassen agreed Manassen would lend Rose money - after the funds were advance, the parties (or their corporate entities) entered into a loan agreement and a deed of release for the Cronulla project - in due course, Manassen's company sued Rose in respect of the loan - held: in the absence of any clause in the loan agreement prescribing strict performance, it is open to the Court to consider other types of performance including vicarious performance - vicarious performance is permissible unless the contract specifically requires the promisor's personal performance - the source of the funds was immaterial in this case - the Court was satisfied that the earlier exchange of emails constituted a binding agreement, the substance of which, in the Court's view, fell into the fourth category in *Masters v Cameron* - Rose's argument that past consideration is no consideration failed for this reason alone - however, this argument would have failed in any event as, taking a functional test, the loan agreement was binding because it treated the advance and entry into the loan agreement as forming part of one single transaction - Rose's defences of promissory estoppel and conventional estoppel also failed - judgment for Manassen's company.
View Decision (I B C)
[From Benchmark Tuesday, 27 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.
View Decision (I B C)
[From Benchmark Tuesday, 27 August 2024]

Maragol v Berry Patch Preschool Kellyville Ridge Pty Ltd [2024] NSWSC 1077
Supreme Court of New South Wales
Rothman J
Negligence - the plaintiffs' daughter died while sleeping at a childcare centre owned and operated by Berry Patch - the plaintiffs sued, contending that the death occurred as a result of a breach of the duty of care of Berry Patch, who owed the deceased and her parents a non-delegable common law duty of care, which it breached, causing them psychiatric injuries - the plaintiffs also included the State of NSW as a defendant, alleging that the State breached a duty imposed upon it, (either at common law, or a statutory duty), in the manner in which the State exercised its supervisory and/or regulatory functions over the childcare centre, or the manner in which it did not exercise such functions - the State sought to strike out parts of the statement of claim relating to its liability - held: the claim against the State was novel, but novelty is not a bar to proceedings - it was unusual for the Regulatory Authority to be the subject of claim in circumstances where the service provider was alleged to have breached the duty imposed upon it - a pleading can be embarrassing if it is ambiguous in the manner in which it states the case to be answered - while a pleading is permitted to be drafted in a way that states a conclusion, such a conclusion may, where there are varying means of reaching the conclusion, leave the defendant in a position where it does not know, precisely, how the case against it is advanced - the plaintiffs set out a number of requirements said to apply to the Regulatory Authority (and thereby the State), but at no stage pleaded how it is said the Regulatory Authority would comply with the obligations or requirements there set out, that is, those steps that were taken and, acting reasonably, should not have been and those steps that were not taken and reasonably should have been - it was not clear from the pleading what the State should have done or

insisted upon being done by the service provider - there seemed to be no allegation that tied the failure to investigate in a timely manner to the cause of harm or injury - there was no pleading as to how s43, s43A, and s44 of the *Civil Liability Act 2002* (NSW) applied and how the State was, as a consequence of its regulatory function, liable - the relevant pleadings were embarrassing and, in the absence of an appropriate and detailed pleading, would cause delay - paragraphs struck out.
View Decision (I B)
[From Benchmark Wednesday, 28 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 (I B C)
[From Benchmark Monday, 26 August 2024]

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. Cumings'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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