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Weekly Civil Law Review

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Executive Summary (1 minute read)

James Cook University v Ridd (FCAFC) - industrial law - termination of respondent's employment with appellant did not contravene s50 *Fair Work Act 2009* (Cth) - appeal allowed (I B C G)

Hughes trading as Beesley and Hughes Lawyers v Hill (FCAFC) - human rights - sexual harassment - trial judge found appellant sexually harassed respondent - appellant ordered to pay respondent general damages and aggravated damages - appeal dismissed (I B C G)

Ceramiche Caesar S.p.A v Caesarstone Ltd (FCAFC) - trade mark - three proceedings - 'deceptively similar' - 'honest concurrent use' - 'authorised use' - 'quality control' - 'control on a wider basis' - appeals allowed (I B C G)

Singh bhnf Ambu Kanwar v Lynch (NSWCA) - negligence - appellant ’professional jockey’ injured when appellant’s horse fell during ’race meeting’ - ’materialisation of an obvious risk’ - ’dangerous recreational activity’ - respondent not liable - appeal dismissed (B I)

Gooley v NSW Rural Assistance Authority (NSWCA) - contract - banking - dismissal of second cross-claim against bank - appeal dismissed (I B C G)

Padraic Gibson (on behalf of the Dungay family) v Commissioner of Police (NSW Police Force) (NSWCA) - public assembly - respondent granted ’prohibition order’ pursuant to s25(1) *Summary Offences Act 1988* (NSW) - jurisdiction - appeal dismissed (B C I G)

Cottle v NSW Commissioner of Police; Police Association of New South Wales v

Commissioner of Police (NSW Police Force) (NSWCA) - judicial review - Industrial Relations Commission had jurisdiction to deal with applicant's claim for relief under s84 *Industrial Relations Act 1996* (NSW) - appeal allowed (B C I G)

Commissioner of Police (NSW) v Gibson (NSWSC) - public assembly - plaintiff sought 'prohibition order' pursuant to s25(1) *Summary Offences Act 1988* (NSW) - application granted (B C I G)

Cosco v Hutley (No 2) (NSWSC) - defamation - proceeding arising from 'television broadcast' - judgment for plaintiff - defendant to pay damages of $300,000 (I)

Savills (NSW) Pty Ltd v ATF CTH Pty Ltd (NSWSC) - contract - consumer law - claim arising from 'alleged agency agreement' - judgment for defendant (B I)

New Acland Coal Pty Ltd v Oakey Coal Action Alliance Inc (QSC) - corporations - winding up - applicant sought to wind up respondent on basis of insolvency - respondent sought stay or adjournment of application until after appeal's hearing in High Court - winding up application adjourned (I B C G)

JKC Australia Pty Ltd v CH2M Hill Companies Ltd [No 2] (WASCA) - contract - appellant sought declarations concerning proper construction of 'Parent Company Guarantees' - primary judge rejected appellant's 'preferred construction' - appeal dismissed (I B)

Summaries With Link (Five Minute Read)

James Cook University v Ridd [2020] FCAFC 123
Full Court of the Federal Court of Australia
Griffiths, Rangiah & SC Derrington JJ
Industrial law - Federal Circuit Court declared that appellant, in making findings against respondent of breach of 'Code of Conduct; giving respondent 'speech directions, 'confidentiality directions', 'no-satire direction', censures, and terminating respondent's employment in breach of cl14 of 'Enterprise Agreement, contravened s50 *Fair Work Act 2009* (Cth) (FWA) - whether primary judge erred in construing Enterprise Agreement - whether termination of respondent's employment with appellant contravened s50 FWA - whether to dismiss proceeding - whether there should be 'further hearing' - held: appeal allowed - second further amended application dismissed.
James Cook (I B C G)
[From Benchmark Monday, 27 July 2020]

Hughes trading as Beesley and Hughes Lawyers v Hill [2020] FCAFC 126

Full Court of the Federal Court of Australia
Collier, Reeves & Perram JJ
Human rights - sexual harassment - respondent claimed appellant sexually harassed her - trial judge found sexual harassment established - trial judge ordered that appellant pay respondent $120,000 general damages and $50,000 aggravated damages - appellant appealed - appellant contended evidence did not support conclusion he sexually harassed respondent - appellant also contended that general damages of $120,000 was manifestly excessive and that there was 'no basis for' aggravated damages - ss3 & 46PO *Australian Human Rights Commission Act 1986* (Cth) - ss28A & 28B *Sex Discrimination Act 1984* (Cth) - whether erroneous failure to consider authority preceding decision in *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 - whether blurring of distinction between aggravated damages and 'punitive or exemplary damages' - held: appeal dismissed.
Hughes (I B C G)
[From Benchmark Tuesday, 28 July 2020]

Ceramiche Caesar S.p.A v Caesarstone Ltd [2020] FCAFC 124
Full Court of the Federal Court of Australia
Nicholas, Burley & Thawley JJ
Trade mark - three proceedings - in first proceeding 'Ceramiche Caesar' sought to appeal against orders which allowed application of 'Caeserstone' for 'Caesarstone Goods Word Mark' 'to proceed to registration' - in second proceeding Ceramiche Caesar sought to appeal against orders which allowed application of Caesarstone for 'Caesarstone Device Mark' 'to proceed to registration' - in third proceeding Ceramiche Caesar appealed against orders which allowed application of Caesarstone for 'Caesarstone Services Word Mark' to remain registered - 'deceptively similar' - 'honest concurrent use' - 'authorised use' - 'quality control' - 'control on a wider basis' - "because of other circumstances" - ss8, 44, 88, 89 & 195(2) *Trade Marks Act 1995* (Cth) held: appeals allowed.
Ceramiche (I B C G)
[From Benchmark Thursday, 30 July 2020]

Singh bhnf Ambu Kanwar v Lynch [2020] NSWCA 152
Court of Appeal of New South Wales
Basten, Leeming, Payne & McCallum JJA; Simpson AJA
Negligence - appellant ’professional jockey’ injured when appellant’s horse fell during ’race meeting’ - respondent caused fall - appellant sued respondent - primary judge dismissed proceedings, finding no breach of duty of care by respondent, that appellant’s injury resulted from ’materialisation of an obvious risk which occurred in the course of a dangerous recreational activity’, and respondent protected from liability by s5L *Civil Liability Act 2002* (NSW) - appellant challenged finding that respondent not negligent - appellant contended that respondent’s ’dangerous riding’ in breach of racing rules was not an “obvious risk” - appellant also contended that appellant’s involvement as professional jockey in race was not ’participation in a “recreational activity"’ - appellant challenged decision in *Goode v Angland*

[2017] NSWCA 311 (*Goode v Angland*) - whether Court should depart form construction Civil Liability Act 2002 (NSW) in *Goode v Angland* - held: appeal dismissed.
View Decision (B I)
[From Benchmark Monday, 27 July 2020]

Gooley v NSW Rural Assistance Authority [2020] NSWCA 156
Court of Appeal of New South Wales
Macfarlan, Meagher & White JJA
Contract - banking - appellants operated 'farming business in partnership' - appellants transferred 'banking facilities' to 'BankWest' - BankWest's 'assets and liabilities' transferred to Commonwealth Bank of Australia ('CBA') - appellants commenced proceedings against respondent - appellant sought declaration respondent 'acted wrongfully in issuing a certificate under' s11 *Farm Debt Mediation Act 1994* (NSW) - CBA filed cross-claim for judgment for outstanding amount and possession of properties - appellants, by second cross-claim, claimed 'damages and compensation' - appellants claimed Bankwest and subsequently CBA breached contract and contravened 'federal consumer and credit laws' - primary judge dismissed second cross-claim - whether making of loan involved 'breach of contract or actionable misconduct' - whether Fixed Interest Rate Loan was varied - conduct - ss12CB & 12DA *Australian Securities and Investments Commission Act 2001* (Cth) - Code of Banking Practice - National Credit Code - Sheld: appeal dismissed.
View Decision (I B C G)
[From Benchmark Tuesday, 28 July 2020]

Padraic Gibson (on behalf of the Dungay family) v Commissioner of Police (NSW Police Force) [2020] NSWCA 160
Court of Appeal of New South Wales
Bathurst CJ; Bell P; Macfarlan JA
Public assembly - administrative law - respondent sought, pursuant to s25(1) *Summary Offences Act 1988* (NSW), 'prohibition order' in respect of 'public assembly and procession' - protest's 'stated purpose' was "To protest against Aboriginal deaths in custody and demand justice for David Dungay Jnr" - prohibition order granted - appellant appealed - jurisdiction - procedural fairness - whether non-compliance with procedures in s25(2) Summary Offences Act deprived Court of jurisdiction - held: appeal dismissed.
View Decision (B C I G)
[From Benchmark Wednesday, 29 July 2020]

Cottle v NSW Commissioner of Police; Police Association of New South Wales v Commissioner of Police (NSW Police Force) [2020] NSWCA 159
Court of Appeal of New South Wales
Bell P; Basten & Payne JJA
Judicial review - applicant was notified of decision of Police Commissioner under s72A *Police Act 1990* (NSW) to "cause [him] to be retired" - applicant sought relief under s84 *Industrial*

Relations Act 1996 (NSW) - Police Commissioner sought declaration that Industrial Relations Commission did not have jurisdiction to deal with applicant's claim - Murphy C acceded to motion - Full Bench upheld appeal, holding Industrial Relations Commission had jurisdiction to determine applicant's claim - Police Commissioner sought judicial review - primary judge quashed Full Bench's decision - applicant sought to appeal - statutory construction - held: Industrial Relations Commission had jurisdiction to deal with applicant's claim - appeal allowed.
View Decision (B C I G)
[From Benchmark Wednesday, 29 July 2020]

Commissioner of Police (NSW) v Gibson [2020] NSWSC 953
Supreme Court of New South Wales
Ierace J
Public assembly - administrative law - plaintiff, pursuant to s25(1) *Summary Offences Act 1988* (NSW), sought 'prohibition order' in of 'public assembly and procession' - protest's 'stated purpose' was "To protest against Aboriginal deaths in custody and demand justice for David Dungay Jnr" - COVID-19 - Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 4) 2020 - *Public Health Act 2010* (NSW) - 'constitutional bar' - 'Implied freedom of political communication jurisdiction' - 'right to free speech' - 'balancing of the competing concerns' - held: application granted.
View Decision (B C I G)
[From Benchmark Tuesday, 28 July 2020]

Cosco v Hutley (No 2) [2020] NSWSC 893
Supreme Court of New South Wales
Rothman J
Defamation - proceeding arising from 'television broadcast' - defendant did not deny imputations convened by her comments in broadcast or that, if imputations conveyed, they were defamatory of plaintiff - defendant contended imputations were 'substantially true and/or consisted of expressions of her honest opinion' - defendant also raised contextual imputations - 'inferences' - 'lay evidence' - 'expert evidence' - '"ordinary reasonable reader/listener/viewer" test' - justification - contextual truth - credit - 'hurt feelings' - 'damage to reputation' - aggravation - held: judgment for plaintiff - defendant to pay damages of $300,000.
View Decision (I)
[From Benchmark Thursday, 30 July 2020]

Savills (NSW) Pty Ltd v ATF CTH Pty Ltd [2020] NSWSC 956
Supreme Court of New South Wales
Adamson J
Contract - consumer law - plaintiff claimed commission under 'alleged agency agreement' under which plaintiff retained by defendant to sell property - plaintiff alternatively claimed damages for defendant's alleged unconscionable conduct in encouraging plaintiff to do work on

basis of assumption plaintiff was defendant's 'exclusive agent' for property's sale - defendant denied there was concluded written agreement with plaintiff - defendant alternatively contended that if there was 'concluded agreement; its terms did not entitle plaintiff to payment - defendant also contended it did not act unconscionably and that evidence which plaintiff adduced did not prove loss from the unconscionable conduct alleged - held: judgment for defendant.
View Decision (B I)
[From Benchmark Friday, 31 July 2020]

New Acland Coal Pty Ltd v Oakey Coal Action Alliance Inc [2020] QSC 212
Supreme Court of Queensland
Davis J
Corporations - winding up - applicant sought to wind up respondent incorporated association on basis of insolvency - debt which gave applicant standing to make application was a costs order which had been made in litigation between parties - respondent had appealed judgment inlitigation to High Court of Australia - special leave to appeal had been granted - respondent sought stay or adjournment of application until after appeal's hearing in High Court - whether 'discretionary considerations' in favour of making winding up order - respondent's interest in prosecution of appeal - whether appeal would be would be practically frustrated by winding up order - applicant's interest to 'avoid incurring ongoing costs' in defence of appeal where respondent would likely be unable to meet costs order if unsuccessful - possibility of High Court ordering security for costs - prejudice to respondent's interest if adjournment refused - *Mineral Resources Act 1989* (Qld) - *Associations Incorporation Act 1981* (Qld) - held: application for winding up of respondent adjourned.
New Acland (I B C G)
[From Benchmark Thursday, 30 July 2020]

JKC Australia Pty Ltd v CH2M Hill Companies Ltd [No 2] [2020] WASCA 112
Court of Appeal of Western Australia
Buss P; Beech & Vaughan JJA
Contract - appellant sought declarations concerning proper construction of 'Parent Company Guarantees' which respondents had executed - primary judge dismissed application, rejecting appellant's construction of the Parent Company Guarantees - appellant sought to establish its 'preferred construction' - whether Parent Company Guarantees were "pay now, argue later' instruments' such that liability of respondents to respondent to claim under the Parent Company Guarantees was not subject to 'defence, set-off or counterclaim - held: appeal dismissed.
JKC (I B)
[From Benchmark Wednesday, 29 July 2020]

Abou Ben Adhem

By: Leigh Hunt

Abou Ben Adhem (may his tribe increase!)

Awoke one night from a deep dream of peace,

And saw, within the moonlight in his room,

Making it rich, and like a lily in bloom,

An angel writing in a book of gold:—

Exceeding peace had made Ben Adhem bold,

And to the presence in the room he said,

"What writest thou?"—The vision raised its head,

And with a look made of all sweet accord,

Answered, "The names of those who love the Lord."

"And is mine one?" said Abou. "Nay, not so,"

Replied the angel. Abou spoke more low,

But cheerly still; and said, "I pray thee, then,

Write me as one that loves his fellow men."

The angel wrote, and vanished. The next night

It came again with a great wakening light,

And showed the names whom love of God had blest,

And lo! Ben Adhem's name led all the rest.

https://en.wikipedia.org/wiki/Leigh_Hunt

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