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Friday, 29 March 2024

Weekly Construction Law Review

Selected from our Daily Bulletins covering Construction

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Executive Summary (One Minute Read)

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

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

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

HABEAS CANEM

The scent on the breeze

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Summaries With Link (Five Minute Read)

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
[From Benchmark Wednesday, 27 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
[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

[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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