



Friday, 29 March 2024

## **Weekly Corporate Governance** **A Weekly Bulletin listing Decisions** **of Superior Courts of Australia covering Corporate Governance** **Law**

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### Executive Summary (One Minute Read)

**Lakomy (liquidator), in the matter of Bennett Murada Pty Limited (in liq) (FCA)** - liquidator of a trustee company appointed as receiver of the assets of the trust

**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

**Blue Dog Group Pty Ltd v Glaucus Research Group California LLC (QSC)** - the Court made preliminary disclosure orders against US entities where there was a potential case of breach of the insider information provisions of the *Corporations Act 2001* (Cth)

## HABEAS CANEM

The scent on the breeze



## Summaries With Link (Five Minute Read)

### **Lakomy (liquidator), in the matter of Bennett Murada Pty Limited (in liq) [2024] FCA 245**

Federal Court of Australia

Helley J

Corporations law - a company was registered in 2012 - Bennett was its sole director and Bennett and his wife each held half the shares - the company was appointed trustee of a discretionary trust created on the same day as its registration - the beneficiaries of the trust were Bennett, his wife, and their two children - the company operated a residential and commercial architectural firm in Sydney in its capacity as trustee of the Trust - the company ceased trading, and entered into a sale agreement with a purchaser, and the assets which were sold were trust assets, and the proceeds of those sales were trust assets - a liquidator was appointed to the company by way of a creditors' voluntary liquidation - the liquidator was satisfied that the company had only ever operated in its capacity as trustee, and therefore all assets and liabilities of the company were derived from the company's trading operations in its capacity as trustee of the trust - the liquidator sought to be appointed receiver of the assets of the trust, so that he could enforce the company's right of indemnification against, and charge over, the assets of the trust, pay trust creditors, and pay his remuneration and expenses for the winding up of the company - held: s57(1) of the *Federal Court of Australia Act 1976* (Cth) provides that the Court may, at any stage of a proceeding, on such terms and conditions as it thinks fit, appoint a receiver by interlocutory order in any case in which it appears to the Court to be just or convenient so to do - this power is not confined to any closed class of case or any particular categories of case, and is made to protect and preserve the property of the trust for the benefit of those persons who are interested in the outcome of the proper administration of the assets and obligations in relation to them - the more common course for a Court to adopt, rather than providing an express power of sale to a liquidator, is to appoint the liquidator as a receiver for the purpose of selling the trust assets and distributing the proceeds among trust creditors - it was just and convenient for the liquidator to be appointed as receiver to enable him to access the funds in the company's bank accounts, because he would otherwise not be able to deal with the assets and creditors of the trust and would be frustrated in the performance of his statutory functions as liquidator - liquidator appointed as receiver of the trust assets.

<https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2024/2024fca0245>

[From Benchmark Monday, 25 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](#)

[From Benchmark Thursday, 28 March 2024]

## **Blue Dog Group Pty Ltd v Glaucus Research Group California LLC [2024] QSC 37**

Supreme Court of Queensland

Brown J

Preliminary disclosure - Blue Dog owns shares in the ASX listed company Blue Sky Alternative Investments Limited - the intention of Glaucus to undertake activist short selling in Australia was publicised through various Australian media outlets, but not the identity of the Australian companies that were to be targeted - Glaucus published a report about Blue Sky, which identified a number of alleged problems - Blue Dog contends the report was published for the purpose of causing the market price of Blue Sky shares to decline so that Glaucus and their clients would profit from the short positions they then held and that the report had caused the value of the shares to drop substantially, causing loss to Blue Dog - Blue Dog also contended that it has a claim based on insider trading in contravention of the Corporations Act 2001 (Cth), in that information that Glaucus "would or may issue a report" which was highly critical of Blue Sky was information not generally available and, if it were generally available a reasonable person would have expected it to have a material effect on the price or value of Blue Sky shares, derivatives or other financial products - Blue Dog applied for preliminary disclosure by Glaucus and others - held: notwithstanding the intrusive nature of the order sought against





Glaucus, particularly when there are no proceedings on foot, Blue Dog had satisfied the Court that the preconditions for making the order were satisfied - the Court was satisfied Blue Dog may have a right to relief under s1043A of the *Corporations Act* against share traders who knew that the Blue Sky Report would or may be released and who traded in Blue Sky shares prior to its public release, and the parties who communicated that inside information to them - the Court was satisfied that Blue Dog had made reasonable inquiries - preliminary disclosure orders made.

[Blue Dog Group Pty Ltd](#)

[From Benchmark Thursday, 28 March 2024]



## INTERNATIONAL LAW

### 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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