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LAWYERS

Benchmark

Friday, 18 October 2024

Weekly Insurance Law Review

Selected from our Daily Bulletins covering Insurance

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Executive Summary (One Minute Read)

Farrell v Super Retail Group Limited (Cross-claim) (FCA) - cross-claim seeking to have solicitors restrained from acting for the applicants dismissed

Credit Suisse Virtuoso SICAV-SIF v Insurance Australia Limited (FCA) - anti-anti-suit injunction granted in respect of one company and refused in respect of another

Cui v Salas-Photiadis (NSWSC) - order withdrawing caveat refused after parties let settlement go through in PEXA while the caveat was in place

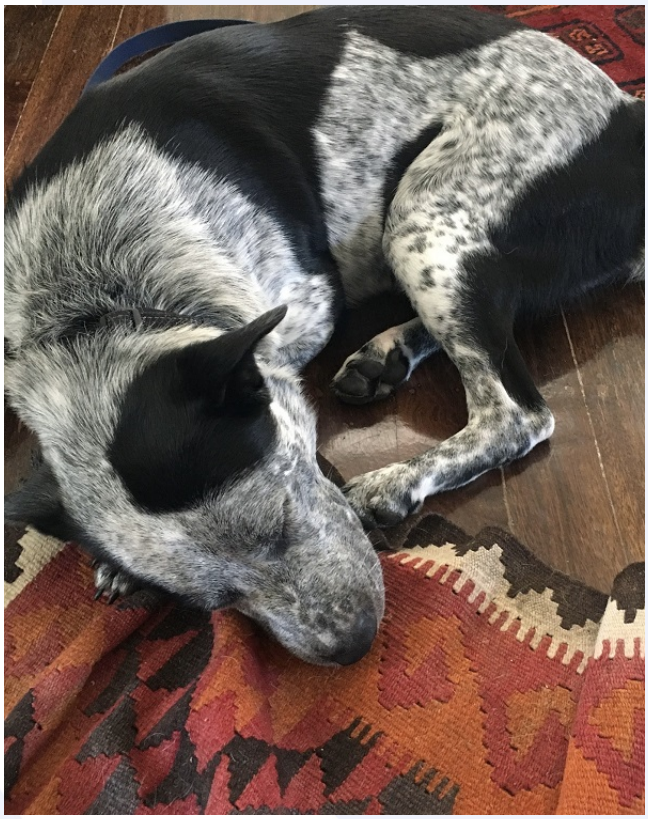
Searle v Commonwealth of Australia (No.10) (NSWSC) - Commonwealth not permitted to rely on allegation of failure to mitigate loss against certain group members in a class action, as it had raised the issue too late

Hoe v Kode (TASSC) - responses by a medical practitioner to the Australian Health Practitioner Regulation Agency were not protected by client legal privilege in a medical negligence action arising out of the same incident

Motor Accidents Insurance Board v Motor Accidents (Compensation) Commission (NTCA) - certain benefits the Commission had paid to an injured person had not been 'payable' and so the Commission was not entitled to an indemnity in respect of those payments

HABEAS CANEM

Peace



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Summaries With Link (Five Minute Read)

Farrell v Super Retail Group Limited (Cross-claim) [2024] FCA 1189
Federal Court of Australia
Lee J
Solicitors' duties - a dispute arose between two senior employees of SRG and that company - the employees commenced separate proceedings, claiming that a binding settlement of the dispute had been reached - SRG and others cross-claimed, seeking to enjoin the applicants' solicitors from acting for them - SRG contended that there was the possibility of defamation actions by third parties against the applicants and their solicitors arising out of a purported "emergency disclosure" under s1317AAD of the *Corporations Act 2001* (Cth) and a related media statement made by the solicitors, and that the solicitors therefore had an interest in avoiding such liability - SRG also contended that the authorisation of the emergency disclosure may be found to have been repudiatory conduct that entitled SRG to terminate the applicant's employment, and the solicitors may therefore be liable in negligence for failure to advise - held: the Court has an implied jurisdiction to restrain legal representatives from acting in a particular case, as an aspect of its supervisory jurisdiction - the test is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a representative be prevented from acting in the interests of the protection of the integrity of the judicial process and the appearance of justice - the applicants had rationally formed the view that persons acting or purporting to act to promote the interests of SRG had suggested to at least one journalist that SRG believed they were engaged in some form of "shakedown" of a public company - it was against the background of such public suggestions that the solicitors for the employees had made the purported "emergency disclosure" and media statement - the approach to any conflict must be applied realistically to a state of affairs in assessing whether it discloses a real conflict of duty and interest and not to something theoretical or a rhetorical conflict - the possibility of defamation proceedings was no higher than a non-fanciful possibility - a more obvious conflict arose due to the fact that, despite advice given by the solicitors to the contrary, the media statement was expressly not a protected disclosure, meaning that SRG was not prevented, under Pt 9.4AAA of the *Corporations Act*, from enforcing contractual rights against the applicants in connexion with the media statement - however, although the solicitors had a reputational interest in having their advice no scrutinised, the Court was not convinced that this will cause any practical difficulty in the conduct of the case - cross-claim dismissed.
Farrell
[From Benchmark Wednesday, 16 October 2024]

Credit Suisse Virtuoso SICAV-SIF v Insurance Australia Limited [2024] FCA 1193
Federal Court of Australia
Moshinsky J
Private international law - ten proceedings were travelling together, in which the applicants sought judgment against Insurance Australia Limited for amounts alleged to be payable under insurance policies purportedly issued by BCC Trade Credit Pty Ltd, as authorised representative

of IAL to Greensill Bank AG (in administration) and Greensill Capital Pty Limited (in liquidation) - the IAL parties contended that Marsh Limited and Marsh Pty Ltd were concurrent wrongdoers under the proportionate liability provisions of Australian legislation - the High Court of England and Wales granted Marsh Limited an interim anti-suit injunction restraining Greensill Bank AG and its administrator from bringing any claims against Marsh Limited in Australia in relation to certain arrangements, but refused such relief in respect of Marsh Pty Ltd - a final hearing was set down - Greensill Bank AG and its administrator contended that Marsh Limited had used documents in the English proceedings in breach of its implied undertaking referred to in *Harman* - they sought an anti-anti-suit injunction against Marsh and Marsh Pty Ltd - held: an anti-suit injunction is an in personam remedy enjoining a party from commencing or continuing proceedings in a foreign court - an anti-anti-suit injunction is an order that a party not seek anti-suit injunctive relief in another forum in relation to proceedings in the original forum - the limited Australian authorities addressing anti-anti-suit injunctions suggest that the same principles apply as with anti-suit injunctions - considerations of comity constituted a strong discretionary consideration against making the anti-anti-suit injunction sought - the question whether the Marsh parties breached the implied undertaking was capable of being considered and determined by the English Court as part of the scheduled final hearing - in relation to Marsh Limited, the order would interfere with the interim orders made by the English court, contrary to the principles of comity - however, comity considerations did not apply to Marsh Pty Ltd - anti-anti-suit injunction refused in respect of Marsh Ltd and granted in respect of Marsh Pty Ltd.
Credit Suisse Virtuoso SICAV-SIF
[From Benchmark Thursday, 17 October 2024]

Cui v Salas-Photiadis [2024] NSWSC 1280
Supreme Court of New South Wales
Hmelnitsky J
Caveats - the plaintiff entered into a contract to purchase a home from the second defendant, borrowing funds from a bank who was to be the incoming mortgagee - the first defendant lodged a caveat over the property, relying on an interest under a "charge" granted under a loan agreement relating to building work done by the first defendant - no participant in the PEXA workspace noticed that the first defendant's caveat had been lodged - on settlement in PEXA, documents were lodged with Land Registry Services, and the funds were disbursed in accordance with the financial settlement schedule - the following day, the bank received a requisition from Land Registry Services informing it that the transfer and mortgage could not be registered because of the first defendant's caveat - the plaintiff sought an order that the caveat be withdrawn under s74MA of the *Real Property Act 1900* (NSW) - held: an equitable charge may or may not take the form of an equitable mortgage - the caveator's reference to a "charge" in the caveat did not necessarily invoke the definition of "Charge" in the *Real Property Act* - the caveat therefore did not fail sufficiently to specify the first defendant's claimed interest merely because it described a claimed equitable mortgage as a charge - under s7D of the *Home Building Act 1989* (NSW), an agreement which purports to grant security for the payment of the consideration payable under a contract to do residential building work is an "other agreement"

within the meaning of that provision - the loan agreement here was therefore within the scope of s7D to the extent it purported to secure payment for residential building work - however, s7D left the balance of the loan agreement intact - the mere failure of the caveat to specify the amount secured is not a sufficient reason to set the caveat aside - the first defendant had demonstrated that it had a good arguable case that the caveat had substance - the balance of convenience favoured the continuation of the caveat until such time as the rights of the parties can be dealt with on a final basis, which would inevitably include a contest as to the parties' competing priorities - order under s74MA refused and matter listed for directions on the Real Property List.
View Decision
[From Benchmark Wednesday, 16 October 2024]

Searle v Commonwealth of Australia (No.10) [2024] NSWSC 1275
Supreme Court of New South Wales
Garling J
Class actions - the plaintiff began representative proceedings against the Commonwealth on behalf of himself and other persons enlisted in the Royal Australian Navy as part of a particular Marine Technician cohort - each of the plaintiff and group members had entered a training contract with the Commonwealth under which the Commonwealth was obliged to provide training which would enable them to attain a Certificate IV in Engineering with a particular National Qualification Code - the plaintiff claimed the Commonwealth had failed to provide the promised training, and that he and the group members had lost the opportunity to seek employment outside the Navy having attained a Certificate IV - the Court had assessed damages in respect of nine group members and in doing so had dealt with a range of issues and set out the appropriate approach to assessment of damages - the Court had then appointed a referee to follow this methodology and report on (1) the value, if any, for each group member of the lost opportunity; and (2) the damages (if any) payable to each group member, including interest - the Commonwealth sought leave to rely on a statement of contentions - held: the particular issue in the statement of contentions involved the failure to mitigate loss - the purpose of the Court in a representative proceeding referring out questions to referees is to enable the issues between the parties to be determined with as much efficiency and speed as is possible - however, proceedings before a referee must still be procedurally fair between the parties - the Commonwealth had previously raised the issue of failure to mitigate, and was on notice that such an allegation had to be raised and notified in a timely way, to allow the claimants an opportunity to consider how to respond and then engage in the response - the Commonwealth should not be permitted to rely on the disputed paragraphs in the notice of contentions - however, the Commonwealth would be able to make a claim of failure to mitigate in the individual claims of other group members for damages provided that it gave adequate and timely notice - it would be appropriate for the parties to invite the referee to formulate directions to enable this to occur.
View Decision
[From Benchmark Monday, 14 October 2024]

Hoe v Kode [2024] TASSC 51
Supreme Court of Tasmania
Daly AsJ
Client legal privilege - the plaintiff claimed damages for personal injuries suffered as a result of the defendant's negligent medical treatment during and around surgery undertaken in 2019 - the plaintiff also submitted a complaint to the Australian Health Practitioner Regulation Agency about "a concern" relating to her treatment, seeking "an apology, a refund, action to keep the public safe, disciplinary action, and to suspend the practitioner" - the defendant provided a response to AHPRA - the response was disclosed during discovery in the medical negligence action - a second response to AHPRA in a letter from the defendant's lawyers came to the plaintiff's attention during communications with AHPRA - plaintiff sought disclosure of the second response, and the defendant sought orders that its first response was protected by client legal privilege - held: the defendant had the onus of showing that the communications were privileged - verbal formulae and bare conclusory assertions of purpose are not sufficient to make out a claim for privilege - while the first response was prepared by the defendant for AHPRA, it was not made by or to any person who was under an express or implied obligation not to disclose its contents - AHPRA was not under any obligation not to disclose the contents of the first response - the second response was prepared by the defendant's solicitors on instructions from the defendant - the second response was prepared for AHPRA - the second response is a communication or a document recording what the defendant instructed his lawyers to communicate to AHPRA - when the second response was made or prepared, AHPRA was under an obligation not to disclose its contents, which obligation arose from the face of the document itself - the facts and circumstances strongly suggested that the purpose for which each response was brought into existence was to communicate to AHPRA, with the intention of persuading it that the defendant treated the plaintiff with all due care, and that it should not uphold the plaintiff's notification of a complaint - the evidence failed to establish that either of the responses were brought into existence for dominant purpose of a lawyer providing legal advice to the defendant - even if the first response was privileged, that privilege was lost when it was communicated to the plaintiff - defendant ordered to make discovery of the second response.
Hoe
[From Benchmark Wednesday, 16 October 2024]

Motor Accidents Insurance Board v Motor Accidents (Compensation) Commission [2024] NTCA 5
Court of Appeal of the Northern Territory
Grant CJ, Barr, & Huntingford JJ
Indemnities - Sullivan suffered severe injuries in a Northern Territory motor vehicle collision between a vehicle in which she was a passenger and a Land Rover and caravan driven by Cooper - Sullivan received payments from the Motor Accidents (Compensation) Commission under the *Motor Accidents (Compensation) Act 1979* (NT) - the NT Motor Accidents Insurance Board insured Cooper for liability resulting directly from the accident - the Commission sought

indemnification for the payments it had made, pursuant to s38(1) of the Act - the primary judge found that Cooper's negligence had caused the collision, and gave judgment in favour of the Commission - a substantial part of the judgment sum was constituted by interim benefits for attendant care services paid by the Commission - the Board appealed - held: the central issue was whether the payments of interim benefits for attendant care services came within the scope of the indemnity conferred by s38(1) - the eligibility conditions for the payment of interim benefits for attendant care services included the criteria in r4F of the *Motor Accidents (Compensation) Regulations 1984* (NT), which include that the clamant has an injury that is 'not permanent and stable' at the date of assessment, other than in 'exceptional circumstances', and that there must be a specialist assessment and certificate in this regard - the term 'payable' in s4 of the Act requires that there be a legal entitlement with a corresponding legally enforceable obligation to pay, so that compensation and other benefits are not 'payable' under the Act unless there is a legal liability to make payment - the primary judge had erred in finding that the Commission had obtained the specialist certification required by r4F as to the injury not being permanent and stable - the primary judge had also erred in holding in the alternative that, even if the Commission had not obtained such certification, compliance with that obligation was not a mandatory requirement - therefore compensation for interim attendant care services was not 'payable' at the time those payments were made - therefore, the interim benefits for attendant care services paid by the Commission did not come within the scope of the indemnity under s38(1) - appeal allowed, and the judgment in favour of the Commission set aside and replaced by judgment for a smaller amount.

Motor Accidents Insurance Board

[From Benchmark Monday, 14 October 2024]

Executive Summary and (One Minute Read)

Aquino v Bondfield Construction Co (SCC) - The fraudulent intent of a senior employee, found to be the directing mind of companies, can be attributed to the companies in a bankruptcy proceeding

Summaries With Link (Five Minute Read)

Aquino v Bondfield Construction Co 2024 SCC 31
Supreme Court of Canada
Wagner CJ, Karakatsanis, Côté, Rowe, Martin, Jamal, & O'Bonsawin JJ
The President of two family-owned construction companies had for years fraudulently taken tens of millions of dollars from the companies through a false invoicing scheme. In subsequent bankruptcy proceedings against the companies, the payments made under the invoicing scheme were challenged under the *Bankruptcy and Insolvency Act*. Under the Act, money paid by the debtor can be recovered if the transfers were made at undervalue with the intent to defraud creditors. The lower court concluded that these were payments made at undervalue with fraudulent intent. The bankrupt entities contended that the payments were made to creditors and that fraudulent intent was not present. The Court held that the executive's fraudulent intent could be attributed to the bankrupt companies and that the money should be paid back. The Supreme Court (Jamal J, joined by Wagner CJ, Karakatsanis, Côté, Rowe, Martin, O'Bonsawin JJ) dismissed the appeal and held that the courts could find that a debtor intended to defraud creditors even if the debtor was not insolvent at the time of the undervalue transfers. Specifically, the executive's fraudulent intent should be attributed to the debtor companies because he was their directing mind. The Supreme Court stated that the test for corporate attribution is simply whether the executive was the directing mind of the business and whether the actions were performed within the corporate responsibility assigned to him. If so, the fraudulent intent of the executive could be attributed to the corporation.
Aquino

Poem for Friday

In My Craft or Sullen Art

By Dylan Thomas (1914-1953)

In my craft or sullen art
Exercised in the still night
When only the moon rages
And the lovers lie abed
With all their griefs in their arms,
I labour by singing light
Not for ambition or bread
Or the strut and trade of charms
On the ivory stages
But for the common wages
Of their most secret heart.
Not for the proud man apart
From the raging moon I write
On these spindrift pages
Nor for the towering dead
With their nightingales and psalms
But for the lovers, their arms
Round the griefs of the ages,
Who pay no praise or wages
Nor heed my craft or art.

Dylan Marlais Thomas, poet, writer and broadcaster, was born on 27 October 1914 in Swansea, Glamorgan, Wales. His well-known works include Under Milk Wood, “a play for voices”, Do not go gentle into that good night, and, And death shall have no dominion. He loved Wales but was not a Welsh nationalist. His father wrote that he was “*afraid Dylan isn’t much of a Welshman”.* Robert Lowell, wrote of criticism of Thomas’ greatness as a poet, "Nothing could be more wrongheaded than the English disputes about Dylan Thomas's greatness...He is a dazzling obscure writer who can be enjoyed without understanding." The Welsh Academy Encyclopedia of Wales described him, and particularly his life in New York City before his death as a "roistering, drunken and doomed poet."

Dylan Thomas reads “In My Craft or Sullen Art”
https://www.youtube.com/watch?v=Tiw3uOT2eUc

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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