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LAWYERS

Benchmark

Friday, 29 March 2024

Weekly Insurance Law Review

Selected from our Daily Bulletins covering Insurance

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Executive Summary (One Minute Read)

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

Trinh v Medical Council of New South Wales (NSWCA) - Executive Officer of the Medical Council had validly delegated power to a disciplinary panel

Jeske v Rowe & Anor (NSWSC) - proceedings transferred from Supreme Court to District Court where one defendant would not agree not to seek special costs order if less than $500,000 damages were awarded

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

HABEAS CANEM

The scent on the breeze

Summaries With Link (Five Minute Read)

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]

Trinh v Medical Council of New South Wales [2024] NSWCA 58
Court of Appeal of New South Wales
Mitchelmore JA; Basten, & Griffiths AJJA
Administrative law - the Medical Council of NSW received two complaints regarding the applicant, a registered medical practitioner - the Council's Executive Officer appointed a panel - the panel resolved to suspend the applicant's registration pursuant to s150 of the *Health Practitioner Regulation National Law (NSW) 2009* (NSW) - the applicant both sought judicial

review and sought to appeal from the Tribunal's decision - there was no dispute that the Council had power to delegate to the Executive Officer, but, the applicant submitted the Council could not delegate in a way which permitted the Executive Officer to subdelegate the exercise of the power to the Panel - held: the Council conferred its functions under s150 and s150A to a person or group of persons, as was expressly permitted by the National Law - what the Council placed in the hands of its Executive Officer was the power of determining the individual composition of the group (or panel) when occasions arose requiring consideration of the exercise of the relevant functions - the terms of the delegations reflected the nature of the functions being delegated, the exercise of which could be required with some frequency and on short notice, and the role of the Executive Officer in administering the affairs of the Council - there was no complaint that the members of the panel were not appropriately qualified - the challenge to the validity of the delegations must be rejected - the contention that there was some incoherence between the step taken by a panel in imposing a suspension and the failure of the Council to refer the complaint to the Tribunal was misconceived - further, he state of mind of the panel was not that of the Council, and the nature and purpose of their respective functions differed - the summons seeking judicial review should be dismissed - the appeal should also be dismissed.
View Decision
[From Benchmark Wednesday, 27 March 2024]

Jeske v Rowe & Anor [2024] NSWSC 242
Supreme Court of New South Wales
Weinstein J
Medical negligence - the plaintiff commenced medical negligence proceedings in the Supreme Court - the plaintiff sought that the matter be transferred to the District Court pursuant to s146(1) of the *Civil Procedure Act 2005* (NSW) - s146(1)(b) provides that proceedings in the Supreme Court on a claim for damages arising from personal injury or death are to be transferred under that section unless the Supreme Court is satisfied that the amount to be awarded to the plaintiff if successful is likely to exceed the jurisdictional limit of the District Court, or that there is some other sufficient reason for hearing the proceedings in the Supreme Court - it was common ground that the amount likely to be awarded to the plaintiff, if successful, would not exceed the jurisdictional limit of the District Court - the first defendant said there was other sufficient reason to keep the proceedings in the Supreme Court, namely the ability for the matter to be case managed in the Professional Negligence List, in circumstances where it was agreed that the issues to be decided ultimately by the Court would be difficult, in particular breach of duty and causation - the second defendant neither consented to nor opposed the transfer - held: it was likely that a hearing date would be obtained either in the District Court or the Supreme Court at about the same time - the first defendant had agreed not to seek an order under r42.34 of the *Uniform Civil Procedure Rules 2005* (NSW) in the event that the plaintiff was awarded damages under $500,000 - this would have the effect that the plaintiff would not be prejudiced as to costs if the matter remained in the Supreme Court - however, the second defendant had not agreed not to seek an order under r42.34 - this in itself was reason enough to find that there was no sufficient reason for hearing the proceedings in the Supreme Court - proceedings transferred to

District Court.
View Decision
[From Benchmark Tuesday, 26 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]

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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