AR CONOLLY & COMPANY
LAWYERS

Benchmark

Friday, 24 May 2024

Weekly Defamation Law

A Weekly Bulletin listing Decisions of Superior Courts of Australia covering Defamation Law

Search Engine

Click here to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

Executive Summary (One Minute Read)

Wright v de Kauwe (No 2) (WASCA) - primary judge had upheld defamation claim arising out of a heated directors' dispute - appeal and cross-appeal both dismissed

Hoser v Harrison (FedCFamC2G) - claims against Meta for Facebook and Instagram posts - some misleading or deceptive conduct claims, and all trade mark and author's moral rights claims, had no reasonable prosects of success - some allegedly defamatory imputations struck out with leave to replead

HABEAS CANEM

Man and loyal dog

Summaries With Link (Five Minute Read)

Wright v de Kauwe (No 2) [2024] WASCA 51
Court of Appeal of Western Australia
Buss P, Mitchell JA, & Lundberg J
Defamation - eSense Lab Ltd was incorporated in Israel in April 2016, and developed technology for the reconstruction of naturally occurring compounds which account for the flavour and fragrance of rare or high value plants, with its initial focus on the cannabis plant - certain statements made during a heated dispute between directors of eSense in relation to the management of that company - de Kauwe was a director of Otsana Pty Ltd, which operated a corporate advisory business that provided services in corporate restructuring and recapitalisations of ASX listed companies, and which was engaged by eSense to provide corporate advisory services - the primary judge found that de Kauwe had been defamed by imputations in two letters and two announcements to the ASX, and awarded damages - the defendants appealed and de Kauwe cross-appealed - held: a defendant who was employed by another company who had been engaged to provide media and investor relations services to eSense was a publisher of the Second ASX Announcement - publication of both ASX Announcements caused de Kauwe to lose eSense director's fees, after he was not re-elected as a director - publication of both ASX Announcements caused de Kauwe to lose a valuable opportunity to acquire share options and shares in an unrelated company, as he had been asked to resign from that unrelated company following the publication of those announcements - the primary judge did not err in valuing de Kauwe's loss of opportunity to acquire those share options and shares at only $200,000 - evidence of de Kauwe's own Calderbank offer was not admissible on the question of whether he unreasonably refused to accept the defendants' Calderbank offers - the primary judge did not err in failing to find that de Kauwe's rejection of the defendants' Calderbank offers was unreasonable - the primary judge did not err in failing to find that a reasonable rejection of those offers justified an order that de Kauwe pay the defendants' party/party costs from the date of the offer - appeal and cross-appeal dismissed.
Wright
[From Benchmark Friday, 24 May 2024]

Hoser v Harrison [2024] FedCFamC2G 436
Federal Circuit and Family Court of Australia (Division 2)
Judge Manousaridis
Intellectual property and defamation - Hoser and Harrison were competing snake catchers and wildlife business operators - Harrison published material critical of Hoser on Facebook and Instagram - Harrison and Meta (the operator of both platforms) refused to remove the material - Hoser sued Harrison and Meta, claiming they had infringed his trade marks and moral rights as author, engaged in misleading or deceptive conduct contrary to s18 of the *Australian Consumer Law*, and defamed him - regarding the ACL and trade mark claims, Hoser made both a direct claim (by Harrison's posts, Meta had itself engaged in misleading or deceptive conduct and had itself used Hoser's trade mark in an infringing way) and a "failure to remove" claim (Meta's

failure to remove the material had either been misleading or deceptive conduct or had caused Meta to be involved in Harrison's contravention, and Meta was a joint tortfeasor in regard to Harrison's trade mark infringement) - Meta applied for the claims against it to be summarily dismissed - held: the direct ACL claim had no reasonable prosects of success, based on *Google Inc v ACCC* [2013] HCA 1 - the Court could not determine whether the "failure to remove" ACL claim had reasonable prospects of success and Hoser would be ordered to provide further particulars - Hoser's direct trade mark claim had no reasonable prospect of success, as the posting by Harrison of trade marks could not constitute Meta's use of those trade marks - the "failure to remove" trade marks claim also had no reasonable prospects of success - the *Trade Marks Act 1995* (Cth) does not make persons involved in trade mark infringements liable, but the general tortious concept of joint tortfeasor may apply - Hoser's allegations were incapable of supporting any of the required findings for Meta to be a joint tortfeasor, namely: (a) Meta had procured Harrison to post the trade marks; (b) Harrison acted as agent for Meta; or (c) Harrison posted the trade marks and allowed them to remain there pursuant to a common design with Meta - the moral rights claim had no reasonable prospects of success, as merely making defamatory statements in relation to Hoser or to his work could not constitute conduct that subjected Hoser's work to derogatory treatment within the meaning of s195AJ of the *Copyright Act 1968* (Cth), and thus could not infringe Hoser's right under s195AI not to have his works subjected to derogatory treatment - the notion of "publication" in the law of defamation is broader than "engage in conduct" in s18 of the ACL, and extends to any activity that facilitates, or contributes to any extent, to the making available for comprehension by a third party matter that conveys a defamatory imputation - certain imputations did not comply with the rules of pleading (by not identifying the parts of the relevant publication on which Hoser relied to support the imputation) or were not sufficiently particularised - these would be struck out, but Hoser would have leave to replead.

Hoser

[From Benchmark Friday, 24 May 2024]

Executive Summary and (One Minute Read)

X Corp v Bright Data Ltd (USDCNDCA) - X Corp (Twitter) failed to establish tort and contract claims against data scraping firm as pre-empted by United States copyright law

Summaries With Link (Five Minute Read)

X Corp v Bright Data Ltd, Case No C23-03698
United States District Court for the Northern District of California
Alsup J
X Corp brought suit against Bright Data Ltd on numerous grounds, all of which related to defendant's scraping and sale of data gathered from plaintiff's Twitter internet platform. The Twitter Terms of Service prohibited data scraping. Data scraping consists of extracting data from a website and copying it into a structured format, allowing for data manipulation or analysis. Here, plaintiff contended that Bright Data was unlawfully accessing Twitter and scraping public data for commercial purposes. X Corp asserted numerous claims based on improper access to X's systems and unlawful scraping and sale of data. With respect to improper access to X's systems, the claims included trespass to chattels, unfair competition, tortious interference with contract and breach of contract. However, the Court found that these claims could not be sustained in the absence of actual injury. With respect to claims based on scraping and sale of data, the claims failed because of Federal copyright law pre-emption. The Terms of Service clearly provided that Twitter users owned their own content and only extended a non-exclusive license to Twitter to make the content publicly available. Under established precedent, a non-exclusive license does not give the licensee the right to exclude others from using the licensed material. The Court noted that X Corp avoided ownership of X users' content because to do so would extinguish X Corp's safe harbors from civil liability provided under Section 230 of the *Communications Decency Act*. Under Section 230, social media companies are immune from claims based on the publication of material on their websites that has been provided by another information content provider. Further, under Section 512(a) of the *Digital Millenium Copyright Act*, social media companies can avoid liability for copyright infringements when they act only as conduits for the transmission of information. The Court found that X Corp was trying to have it both ways by disclaiming ownership of the content to take advantage of the safe harbours and then trying to exert ownership rights to the content pursuant to Terms of Service that prohibited scraping of website content. To the extent that X Corp was trying to exert control over content while disclaiming copyright ownership, the Court held that X's common law claims were pre-empted by the *Copyright Act* of the United States. The Court dismissed the complaint but allowed X Corp to seek leave to amend if the amended complaint corrected the

deficiencies addressed by the Court. To facilitate further proceedings, plaintiff was ordered to supply a red-lined copy of the proposed amended complaint showing all proposed changes. Failing that, judgment in favour of defendant would be entered.
X Corp

Poem for Friday

From *The Tempest*, Act 4 Scene 1

By: William Shakespeare (1564-1616)

Our revels now are ended. These our actors,

As I foretold you, were all spirits and

Are melted into air, into thin air:

And, like the baseless fabric of this vision,

The cloud-capp'd towers, the gorgeous palaces,

The solemn temples, the great globe itself,

Yea, all which it inherit, shall dissolve

And, like this insubstantial pageant faded,

Leave not a rack behind. We are such stuff

As dreams are made on, and our little life

Is rounded with a sleep.

Recitation by **Patricia Conolly**. With seven decades experience as a professional actress in three continents, Patricia Conolly has credits from most of the western world's leading theatrical centres. She has worked extensively in her native Australia, in London's West End, at The Royal Shakespeare Company, on Broadway, off Broadway, and widely in the USA and Canada.

Her professional life includes noted productions with some of the greatest names in English speaking theatre, a partial list would include: Sir Peter Hall, Peter Brook, Sir Laurence Olivier, Dame Maggie Smith, Rex Harrison, Dame Judi Dench, Tennessee Williams, Lauren Bacall, Rosemary Harris, Tony Randall, Marthe Keller, Wal Cherry, Alan Seymour, and Michael Blakemore.

She has played some 16 Shakespearean leading roles, including both Merry Wives, both Viola and Olivia, Regan (with Sir Peter Ustinov as Lear), and The Fool (with Hal Holbrook as Lear), a partial list of other classical work includes: various works of Moliere, Sheridan, Congreve, Farquar, Ibsen, and Shaw, as well as roles such as, Jocasta in Oedipus, The Princess of France in Love's Labour's Lost, and Yelena in Uncle Vanya (directed by Sir Tyrone Guthrie), not to mention three Blanche du Bois and one Stella in A Streetcar Named Desire.

Patricia has also made a significant contribution as a guest speaker, teacher and director, she has taught at The Julliard School of the Arts, Boston University, Florida Atlantic University, The North Carolina School of the Arts, University of Southern California, University of San Diego, and been a guest speaker at NIDA, and the Delaware MFA program.

Click Here to access our Benchmark Search Engine