COMMON LAW PRACTICE UPDATE 56

Offers of settlement/Section 131 *Evidence Act 1995* (NSW)

Brereton J held that s 131 of the *Evidence Act* 1995 does not make admissible every offer of settlement that may be relevant to a question of costs in *Tony Azzi (Automobiles) Pty Ltd & Ors v Volvo Car Australia Pty Ltd* [2007] 71 NSWLR 140. Section 30(4)(a) of the *Civil Procedure Act* 2005 has the effect that any evidence of settlement offers made at a mediation is inadmissible in subsequent proceedings - even those relating to costs. Accordingly, there was no need for His Honour to decide whether a discretion existed to reject evidence of mediation offers even without that provision. However, even if the offer had been admissible, he did not think that the failure to accept it would have been so unreasonable as to justify an indemnity costs order in a context where it was not apparent that it could or would be relied upon in connection with costs.

Costs of Coronial Inquiry/Actions Against Prison Authorities

A prisoner committed suicide whilst in custody in *Roach & Ors v The Home Office* [2009] EWHC 312 (QB). The death occurred in circumstances where prison officers had failed to provide adequate care for the person at risk. In the subsequent civil claim brought under the *Law Reform (Miscellaneous Provisions) Act* 1934 (UK) and the *Human Rights Act* 1998, a settlement was reached involving £10,000 plus an order that the claimant's reasonable costs be paid by the defendant. The claimant's costs included a sum for representation at the Coronial Inquiry. There was no power available to the coroner to make an order as to the costs of attendance. As a result, The Home Office argued that this meant that costs in the civil proceedings could not be awarded in respect of the Coronial Inquiry. It was held on appeal in the Queen's Bench Division, that the costs of and incidental to the inquest were costs of and incidental to the civil claim and therefore could be recovered.

Duty of Care to Employees of Contractors

The plaintiff in *Waco Kwikform Ltd v Perigo and Workers Compensation Nominal Insurer* [2014] NSWCA 140 was injured when he fell 8 metres while dismantling scaffolding, Waco, the appellant, had contracted with the plaintiff's employer for the erection and dismantling of the scaffolding, which it also supplied. The plaintiff brought an action in negligence against Waco as well as his employer, then, when his employer was deregistered, the plaintiff was given leave to proceed against the workers compensation insurer. At trial it was held that both Waco and the employer were negligent. 75% was apportioned as to Waco and 25% as to the employer, and there was no contributory negligence found on the part of the plaintiff. It was critical in this respect that there was an acceptance that Waco assumed responsibility for devising and supervising the system of work for dismantling the scaffolding to be followed by contractors' employees such as the plaintiff. On appeal, it was held that on the facts that Waco's duty to exercise reasonable care extended to ensuring that the system of work adopted by the employer for dismantling the scaffolding was safe. The primary judge did not err in finding that in exercising that duty of care in devising the dismantling process, it was necessary for both Waco and the employer to take into account the possibility of inadvertence and carelessness on the part of the scaffolder. It was also found however that the plaintiff's conduct was not merely due to

inadvertence or carelessness. It was incompatible with the conduct of a prudent and reasonable scaffolder and accordingly, a finding of 20% contributory negligence was made, although the apportionment at first instance was upheld. Because the appeal was otherwise dismissed, Waco was ordered to pay 90% of the plaintiff's costs of the appeal and the costs at first instance in favour of the plaintiff were left undisturbed.