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ARTICLES

STEMMING THE FLOOD: PROCEDURAL AND ETHICAL ISSUES ARISING FROM POTENTIAL FLOOD LITIGATION

Jennifer Corrin and Francesca Bartlett

Potential legal action arising from the 2011 Queensland floods raises three interesting issues of procedure and ethics. First, there is the question of the type of group action to be taken, which will depend on the jurisdiction in which the proceedings are commenced. The distinction between class actions (which are not available in Queensland) and representative actions, raises some interesting questions. Secondly, the threatened action involves commercial funding of litigation; and thirdly, is the related issue of advertising for potential claimants by the funders and solicitors. This article examines these issues and some of the surrounding questions. 250

THE ARBITRABILITY OF OPPRESSION AND WINDING-UP ACTIONS

Alistair Marchesi and Kanaga Dharmananda SC

International commercial arbitration depends upon the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Any arbitration rests upon the existence of an arbitration agreement, dealing with a matter that is capable of being resolved by arbitration. However the New York Convention, and the Model Law do not define, with specificity, the type of matters which are “capable of settlement by arbitration”. This article considers whether certain statutory provisions of corporations legislation are able to be arbitrated in view of recent case law. We conclude that there are few bars to such matters falling within arbitral jurisdiction, although the power of arbitrators to make certain awards is ultimately limited. 258

OPPRESSION IN THE CONTEXT OF CORPORATE TRUSTEES

Michael May

Parties going into business together often use corporate trustee structures, which provide incidental asset protection and taxation benefits. However, an unintended consequence of such structures may be to deprive the parties of access to remedies under the Corporations Act 2001 (Cth) for oppression. This article seeks to reconcile the conflicting authorities on the application of oppression provisions to corporate trustees. It argues that there is limited scope for the kinds of oppressive conduct recognised by the Corporations Act to arise in the context of a corporate trustee. 271

THINGS GAINED THROUGH UNJUST FRAUD ARE NEVER SECURE: FAIRCLOUGH HOMES V SUMMERS

Mark Smyth

In *Fairclough Homes Ltd v Summers* [2012] 1 WLR 2004, the United Kingdom Supreme Court unanimously held that “the court does have jurisdiction to strike out a statement of case under CPR r 3.4(2) for abuse of process even after the trial of an action in circumstances where the court has been able to make a proper assessment of both liability and quantum” (at [33]). The Supreme Court concluded that a court should only exercise this discretion for cases involving fraud in “very exceptional circumstances” where it was “just and proportionate” and declined to do so on the facts of the case (at [61]-[63]). Nevertheless, the finding raises key conceptual tensions in the court’s strike out powers and has implications for the conduct of litigation in English and Australian courts. 280

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