JOURNAL OF CIVIL LITIGATION AND PRACTICE

Volume 9, Number 3

2021

EDITORIAL – *General Editors: Roderick Joyce QSO QC and Professor Michael Legg*

Briginshaw and Finding Serious Allegation Proved on the Balance of Probabilities – *Michael Legg* 107

The Civil Standard of Proof in New Zealand – *Roderick Joyce QSO QC* 108

ARTICLES

Legislating for Common Sense: The Case for (Re)Enacting Pt 2A of the Civil Procedure Act 2005 (NSW) – *John Woodward*

In 2009 the New South Wales Parliament legislated an amendment to the *Civil Procedure Act 2005* (NSW) that would have had the effect of requiring intending litigants to make reasonable efforts to resolve their disputes before commencing litigation. Despite widespread community consultation and bipartisan support from the major political parties, the newly enacted Pt 2A did not take effect and was ultimately repealed. This article traces the passage of Pt 2A through Parliament and considers related commentary over the past decade. It is argued that the reasons advanced against introducing the Pt 2A amendment are now far from convincing, if indeed they ever were, and that it is time to reintroduce a "reasonable efforts" requirement into the *Civil Procedure Act*. 111

After the Event Insurance and Security for Costs: Inconsistency in the Australian Approach – *Daniel Meyerowitz-Katz*

Security for costs (SFC) is required in situations where a plaintiff is likely to be unable to pay a costs order in favour of a defendant. The most common forms of security are presently the payment of cash into court or the provision of an unconditional bank guarantee. In recent years, there have been increasing attempts in Australia to provide, as SFC, a policy of insurance obtained by the plaintiff that insures against an adverse costs order ("after the event" or "ATE" insurance). This article analyses the origins and history of ATE insurance and SFC, as well as the British and Australian decisions concerning the use of ATE insurance as security. The analysis reveals inconsistent approaches to this question, both between Australia and the United Kingdom and within Australia. However, there are a number of principles that can be discerned in relation to when an ATE policy will suffice as a form of security. 122

CASE NOTES – *Editor: Michael Legg*

The Federal Court of Australia Limits Orders for Security for Costs in Industrial Class Actions – *Daniel Moloney and Corey Byrne* 137

Supreme Court Orders First Opt-Out Class Action in New Zealand: Southern Response Earthquake Services Ltd v Ross – *Nikki Chamberlain* 143