

# Benchmark

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## Daily Composite Insurance, Banking, Construction & Government A Daily Bulletin listing Decisions of Superior Courts of Australia

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### Executive Summary (1 minute read)

**Aspect Contracts (Asbestos) Limited (Respondent) v Higgins Construction Plc (Appellant)** (UKSC) - construction contract - implied term - right to recover payment - restitution - appeal dismissed (B C)

**Bob Jane Corporation Pty Ltd v ACN 149 801 141 Pty Ltd** (FCA) - contempt - failure to pay fines - order directing Registrar to apply for punishment of continuing contempt (I B)

**Rodger v De Gelder** (NSWCA) - judicial review - motor accidents compensation - Panel's certificate vitiated by jurisdictional error - appeal dismissed (I G)

**Francica v Allianz Australia Insurance Ltd** (NSWSC) - administrative law - error of law and error of jurisdiction by Medical Review Panel - certificates quashed (I G)

**Australian Institute of Fitness Pty Limited v Australian Institute of Fitness (Vic/Tas) Pty Ltd (No 2)** (NSWSC) - privilege - materials referred to in affidavit - no waiver of privilege - access to material refused (I)

**Boriop Pty Ltd v Moussi** (VSC) - corporations - statutory demand - genuine dispute not established - statutory demand not set aside (B)

**Gambaro Pty Ltd v Rohrig (Qld) Pty Ltd** (QSC) - summary judgment - pleadings - security of payments - restitution - applications dismissed (B C CW)

# Benchmark

**Orchid Avenue Pty Ltd v Parniczky (QSC) - contract for sale - non-performance of contract - judgment for vendor - damages (B)**

## Summaries With Link (Five Minute Read)

### **Aspect Contracts (Asbestos) Limited (Respondent) v Higgins Construction Plc (Appellant) [2015] UKSC 38**

Supreme Court of the United Kingdom

Lord Mance, Lord Wilson, Lord Sumption, Lord Reed & Lord Toulson

Construction contract - limitations - respondent contracted with building contractor to carry out asbestos survey and report on blocks of maisonettes which building contractor was considering redeveloping - during redevelopment building contractor allegedly found asbestos containing materials not identified in report - adjudicator concluded respondent in breach of contractual and tortious duties causing loss to building contractor - parties did not agree to treat adjudicator's decision as final - building contractor did not commence proceedings and limitation period expired - respondent commenced proceedings to recover amount it paid to building contractor pursuant to adjudication - respondent contended no sum was due on examination of merits of original dispute - building contractor counterclaimed for balance of claim and interest - High Court rejected respondent's claim on basis there was no implied term for repayment or entitlement to restitution after expiry of limitation period in 2010 or 2011 - Court of Appeal found there was implied term and allowed appeal - effect of adjudication pursuant to provisions implied into construction contract under s108(5) *Housing Grants, Construction and Regeneration Act 1996*, read *Scheme for Construction Contracts (England and Wales) Regulations 1998* (SI 1998 No 649) - held: it was an implied contractual term that respondent would have directly enforceable right to recover payment if on final determination on merits of original dispute, sums shown not to have been due to building contractor - repayment could also be claimed by way of restitution - building contractor was time-barred from pursuing its counterclaim for the balance of its original claim - appeal dismissed

Aspect (B C)

### **Bob Jane Corporation Pty Ltd v ACN 149 801 141 Pty Ltd [2015] FCA 743**

Federal Court of Australia

Besanko J

Contempt - applicant claimed respondents failed to comply with Court's orders in proceedings - applicant brought contempt proceedings against first, second, fourth, sixth and seventh respondents by interlocutory application and statement of charge - Court found respondents guilty of contempt and ordered payment of fines - failure to pay fines - applicant sought order that Registrar make application for punishment of continuing contempt - r42.16 *Federal Court Rules 2011* (Cth) - held: failure to pay fine may constitute contempt of court - most appropriate enforcement procedure was that sought by applicant - Court 'may' make an order where it is 'alleged' that person was guilty of contempt of Court - no discretionary reasons for not making

# Benchmark

an order - plainly sufficient material to justify making of order sought.

[Bob](#) (I B)

## **Rodger v De Gelder [2015] NSWCA 211**

Court of Appeal of New South Wales

Macfarlan, Gleeson & Leeming JJA

Judicial review - motor accidents compensation - respondent injured in motor vehicle accident when vehicle driven by respondent collided with rear of respondent's stationary vehicle - respondent sued appellant - medical dispute referred to Motor Accidents Medical Assessment Service - Review Panel revoked certificate of medical assessor which certified degree of permanent impairment as 20% - Review Panel certified a degree of permanent impairment as 0% - primary judge found Panel failed to take into account relevant considerations - held: Panel did not engage with evidence of respondent's complaint of onset of thoracic pain at time of and continuing after accident - Panel misread doctor's report that recorded history of pain in thoracic region at time of accident - Panel failed to respond to substantial argument based on evidence relied on by respondent as to causation of injury amounting to jurisdictional error - Panel failed to apply itself to real question to be decided in carrying out statutory function in s58(1)(d) *Motor Accidents Compensation Act 1999* (NSW) because it misunderstood evidence relevant to its determination - Panel's decision was not real exercise of its statutory function - appeal dismissed.

[Rodger](#) (I G)

## **Francica v Allianz Australia Insurance Ltd [2014] NSWSC 1962**

Supreme Court of New South Wales

Rothman J

Administrative law - plaintiff sought to set aside certificates and reasons of Medical Review Panel - whether Panel's determination that plaintiff's shoulder injury was not caused by motor accident was affected by error of law or jurisdictional error - held: Panel answered wrong question - Panel's opinion that abnormalities in shoulder caused by an event other than relevant accident was pure conjecture - Panel failed fundamentally to determine issues before it on balance of probabilities - there was failure "to give adequate weight to relevant factors of great importance" and giving of "excessive weight to an irrelevant factor of no importance" - certificates quashed.

[Francica](#) (I G)

## **Australian Institute of Fitness Pty Ltd v Australian Institute of Fitness (Vic/Tas) Pty Ltd (No 2) [2015] NSWSC 994**

Supreme Court of New South Wales'

Sackar J

Privilege - Victorian Parties sought access to what they alleged was legal advice disclosed and referred to in affidavit, invoices referred to in affidavit and solicitors' files to which those invoices related - conduct inconsistent with maintenance of privilege - whether material must be read before privilege waived - held: affidavit did not put in issue legal advice - reasonable reading of

# Benchmark

affidavit did not disclose substance of advice giving rise to necessary inconsistency - no waiver of privilege - motion dismissed.

[Australian \(I\)](#)

## **Gambaro Pty Ltd v Rohrig (Qld) Pty Ltd [2015] QSC 170**

Supreme Court of Queensland

Atkinson J

Summary judgment - pleadings - security of payments - restitution - plaintiff and defendant were parties to construction contract which required defendant to carry out construction work for plaintiff - defendant made payment claim under *Building and Construction Industry Payments Act 2004* (Qld) (BCIPA) - plaintiff paid payment claim in part - plaintiff sought declaration it was not liable for amount it paid and order that defendant make restitution of amount - defendant sought to strike out statement of claim - plaintiff sought summary judgment - ss99 & 100 BCIPA - s32 *Building and Construction Industry Security of Payment Act 1999* (NSW) - held: plaintiff's claims either admitted, not admitted for reasons set out in defence, or denied by defendant - there were issues which were the subject of factual and legal dispute between parties which could only be determined on trial - defendant's application to strike out paragraphs or subparagraphs of statement of claim concerned issues which needed to be determined at trial - applications dismissed.

[Gambaro \(B\)](#)

## **Boriop Pty Ltd v Moussi [2015] VSC 345s**

Supreme Court of Victoria

Gardiner AsJ

Corporations - statutory demand - plaintiff sought to set aside statutory demand served on it by defendant for debt described in schedule as 'moneys lent by the creditor to the company on 8 March 2012 and evidenced by a Loan Agreement deed dated 8 March 2012' - plaintiff contended was genuine dispute in respect of demand - plaintiff asserted that debt subject of demand was by owed not by it, but by its director - ss459G & 459H *Corporations Act 2001* (Cth) - held: plaintiff failed to discharge onus to establish dispute on which it relied was genuine - dispute alleged was spurious - proceeding dismissed.

[Boriop \(B C CW\)](#)

## **Orchid Avenue Pty Ltd v Parniczky [2015] QSC 207**

Supreme Court of Queensland

Burns J

Contract for sale - plaintiff agreed to sell apartment "off the plan" to first defendant trustee for trust - settlement was agreed to occur after registration of plan and creation of separate title - second defendant guaranteed payment, purchaser's performance of contractual obligations and indemnified plaintiff for loss arising from breach - settlement became due - first defendant refused to complete - plaintiff terminated contract - deposit released - plaintiff claimed damages for non-performance of contract - held: issues raised in amended defence resolved in plaintiff's favour - plaintiff made out case for damages for non-performance of contract - counterclaim

# Benchmark

dismissed - judgment for plaintiff.

Orchid (B)

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