

Friday, 1 May 2015

Weekly Law Review

Selected from our Daily Bulletins covering Insurance, Banking,
Construction & Government

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

Australian Competition and Consumer Commission v ACN 117 372 915 Pty Ltd (in liq) (formerly Advanced Medical Institute Pty Ltd) (FCA) - consumer law - treatments for premature ejaculation and erectile dysfunction - unconscionable conduct - declarations and orders (I B G)

Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd (NSWCA) - insurance - member of fund did not satisfy definition of total and permanent disablement in group life insurance policy - appeal dismissed (I B)

Moshos v French (NSWCA) - contract - evidence - no binding agreement for transfer of shares in company - appeal dismissed (I B)

Poletti v Jones (NSWCA) - succession - family provision orders - variation of provision orders in intervener's favour - appeal largely dismissed but first instance orders varied (B)

Nadarajapillai v Naderasa (NSWCA) - loan agreement - requirement of 90 days' notice to debtor satisfied - lender entitled to repayment - borrower's appeal dismissed (B)

Morocz v Marshman (NSWSC) - medical negligence - doctor did not fail to warn patient of risks or side effects of surgical procedure - doctor not negligent (I)

Geitonia Pty Ltd t/as Trustee for the Annandale Unit Trust v Westpac Banking Corporation (NSWSC) - mortgages - second mortgagee entitled to require first mortgagee to

transfer mortgage to it (B)

Bailey v RSL Lifecare Ltd (NSWSC) - contract - no binding agreement for licence of unit in retirement village - no estoppel - summons dismissed (I B)

Hargood v OHTL Public Company Ltd (NSWSC) - contract - plaintiff injured at hotel in Bangkok - exclusive jurisdiction clause in guest registration form was not part of contract - Court not clearly inappropriate forum - stay refused (I)

Shuetrim v FSS Trustee Corporation (NSWSC) - contract - insurance - superannuation - plaintiff entitled to total and permanent disablement benefits under policies (I B)

Metgasco Ltd v Minister for Resources and Energy (NSWSC) - judicial review - unlawful suspension of operations at gas exploration well - decisions quashed (I B C G)

Savino v Schieven (VSCA) - negligence - motor vehicle accident - no arguable error by jury - leave to appeal refused (I)

Daunt v Daunt (VSCA) - constructive trust - evidence - transfer of property from parents to child - no undue influence - appeal dismissed (I B)

Jeffrey and Curnow v Giles; Giles v Jeffrey and Curnow (VSCA) - damages - defamation - damages so low as to be inappropriate - appeal allowed (I)

Vision Eye Institute Ltd v Kitchen (No 2) (QSC) - damages - breach of services agreement by ophthalmologist causing closure of clinics - damages assessed at \$10,845,476 (I B)

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Summaries With Link (Five Minute Read)

Australian Competition and Consumer Commission v ACN 117 372 915 Pty Ltd (in liq) (formerly Advanced Medical Institute Pty Ltd) [2015] FCA 368

Federal Court of Australia

North J

Consumer law - unconscionable conduct - contract - AMI offered treatments for premature ejaculation and erectile dysfunction advertised to result in longer lasting sex - ACCC alleged AMI engaged in unconscionable conduct contrary *Trade Practices Act 1974* (TPA) and *Australian Consumer Law* - ACCC also alleged refund term unfair and void under ACL - ss21, 22, 23, 24, 25, 27, 232, 239, 240, 243, 246 & 250 *Competition and Consumer Act 2010* - ss97 & 14 *Evidence Act 1995* - ss51AB & 80 TPA - held: AMI's conduct unconscionable - contract term unfair - CEO made all critical decisions relating to business of AMI - CEO responsible for AMI's unconscionable conduct - orders and injunctions made - CEO excluded for seven years from continuing main role in business of AMI which involved the unconscionable conduct - declarations and orders made.

[AMI](#) (I B G)

[From Benchmark 24 April 2015]

Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd [2015] NSWCA 104

Court of Appeal of New South Wales

Basten, Meagher & Gleeson JJA

Insurance - trusts - primary judge determined appellant did not satisfy definition of Total and Permanent Disablement (TPD) in group life insurance policy issued by first respondent insurer to second respondent trustee of superannuation fund - determination made on evidence notwithstanding definition of TPD in policy provided relevant opinion as to incapacity be that of insurer - appellant challenged correctness of determination - ss13, 14 & 48A *Insurance Contracts Act 1984* (Cth) - ss6, 14, 18, 37, 41, 46 *Superannuation (Resolution of Complaints) Act 1993* (Cth) - held: primary judge did not err in not being satisfied appellant was within definition of TPD in policy - not necessary to consider questions concerning trustee's position and relief which would arise if the appeal successful - appeal dismissed.

[Birdsall](#) (I B)

[From Benchmark 23 April 2015]

Moshos v French [2015] NSWCA 106

Court of Appeal of New South Wales

Macfarlan, Emmett & Leeming JJA

Contract - evidence - appellant claimed he entered legally binding agreement with respondent pursuant to which respondent would incorporate company and parties would cause company to apply for and obtain facility - appellant asserted parties agreed that once facility granted respondent would transfer 50 % of his shareholding of company to appellant - company formed

- facility granted - respondent declined to transfer shares - primary judge found parties did not enter alleged agreement and dismissed proceedings - r28.2 *Uniform Civil Procedure Rules 2005* - inferences - held: no grounds relied on in notice of appeal made out - no material relied on in oral argument supported conclusion that primary judge erred in rejecting appellant's case - appeal dismissed.

[Moshos](#) (I B)

[From Benchmark 27 April 2015]

Poletti v Jones [2015] NSWCA 107

Court of Appeal of New South Wales

Basten, Emmett & Leeming JJA

Succession - family provision - testator by Will left 85% of estate to his appellant son and 15% to youngest son (third respondent) - appellant also appointed executor - other children (respondents and another son) deliberately excluded for intervening in family proceedings in support of mother and maintaining no contact with the testator - respondents sought provision pursuant to s59 *Succession Act 2006* (NSW) - trial judge ordered provision should be made for each of the respondents - appellant sought to set aside provision in favour of respondents - third respondent intervened on basis effect of trial judge's orders was to deprive him of significant part of benefit conferred on him by Will - held: trial judge did not err in not applying two-step approach under s59 or in making provision for respondents - no error in factual findings - respondents and third respondent should receive same share of father's estate - variation of provision orders in intervener's favour - appeal largely dismissed but first instance orders varied.

[Poletti](#) (B)

[From Benchmark 29 April 2015]

Nadarajapillai v Naderasa [2015] NSWCA 109

Court of Appeal of New South Wales

McColl, Macfarlan & Emmett JJA

Contract - loan agreement - borrower appealed from decision in which primary judge found lender was entitled to rely on loan agreement with borrower - primary judge found that 90 days' notice required by agreement had been given to borrower and that as borrower had not repaid money lender was entitled to verdict - procedural fairness - necessary findings of fact - adequacy of reasons - rr6.12(6) and 6.12(7) *Uniform Civil Procedure Rules 2005* - held: no substance in amended grounds of appeal, all of which were unarguable - appeal dismissed.

[Nadarajapillai](#) (B)

[From Benchmark 29 April 2015]

Morocz v Marshman [2015] NSWSC 325

Supreme Court of New South Wales

Harrison J

Medical negligence - plaintiff suffered from condition causing sweaty palms - plaintiff contended defendant doctor failed to warn her of known risks and complications of surgery which he

performed on her, and to tell her other things which he should have mentioned having regard to severity of symptoms and success rate of operation - duty to warn and informed consent - ss5B, 5C, 5D, 5H, 5I, 5O & 5P *Civil Liability Act 2002* (NSW) - held: plaintiff did not establish doctor failed to warn her of any material risk or side effect known or understood in 2007 to be inherent risk or side effect of surgery - Court not satisfied doctor failed to warn her of any other risk or side effect of procedure - no breach of duty - verdict for doctor.

[Morocz](#) (I)

[From Benchmark 23 April 2015]

Geitonia Pty Ltd t/as Trustee for the Annandale Unit Trust v Westpac Banking Corporation [2015] NSWSC 419

Supreme Court of New South Wales

Ball J

Mortgages - first plaintiff registered proprietor of property granted first ranking registered mortgage over property to first defendant bank - first plaintiff also granted second ranking registered mortgage second defendant - first plaintiff failed to make payment to second defendant - bank declared events of default and demanded amounts due - bank served notice under s57(2)(b) *Real Property Act 1900* (NSW) - first plaintiff attempted to exercise rights under s94(1) *Conveyancing Act 1919* (NSW) by requiring bank to transfer its mortgage first to it and then to a company it nominated - first plaintiff sought declaration it was entitled to obtain transfer of mortgage to company on payment to bank of amount owing to it - first plaintiff also sought to restrain bank from transferring mortgage to second defendant - construction of s94(1) - whether second mortgagee could require first mortgagee to transfer its mortgage to second mortgagee, or whether second mortgagee must nominate third person to whom mortgage was to be transferred - *any third person* - held: nothing to prevent second defendant from requiring bank to transfer its mortgage to itself - that right took priority over any right first plaintiff had - proceedings dismissed.

[Geitonia](#) (B)

[From Benchmark 23 April 2015]

Bailey v RSL Lifecare Ltd [2015] NSWSC 448

Supreme Court of New South Wales

Darke J

Contract - equitable estoppel - plaintiff alleged it made binding contract with defendant whereby plaintiff would licence residential unit in retirement village operated by defendant - plaintiff sought decree of specific performance or that defendant was estopped from denying it was bound to enter into alleged agreement - defendant denied agreement reached - defendant contended that even if binding agreement made, specific performance should be refused it would require defendant to breach *Retirement Villages Act 1999* - defendant denied any estoppel arose - held: no binding contract entered between parties for licence of unit - parties' conduct did not lead to conclusion contract was made - estoppel argument failed - summons dismissed.

[Bailey](#) (I B)

[From Benchmark 27 April 2015]

Hargood v OHTL Public Company Ltd [2015] NSWSC 446

Supreme Court of New South Wales

Davies J

Contract - private international law - negligence - plaintiff injured at hotel in Bangkok sued owners operators and managers of hotel - proceedings served on defendant in Hong Kong and Thailand - defendants sought orders pursuant to rr11.7 & 12.11 *Uniform Civil Procedure Rules 2005* that proceedings be stayed on basis Court was inappropriate forum or that no reasonable cause of action disclosed against defendants - plaintiff accepted only appropriate defendant was first defendant - held: exclusive jurisdiction notation on Guest Registration Form signed by plaintiff when she checked into hotel was not term of contract between parties - contract made at time reservation made, not at time of check-in at hotel - defendant did not discharge onus to show Court was inappropriate forum - stay refused - notice of motion dismissed.

[Hargood](#) (I)

[From Benchmark 28 April 2015]

Shuetrim v FSS Trustee Corporation [2015] NSWSC 464

Supreme Court of New South Wales

Stevenson J

Contract - insurance - plaintiff was member of superannuation fund - trustee of fund effected insurance policies with second defendant (MetLife) and third defendant (TAL) - plaintiffs sought declarations TAL and MetLife “constructively denied” his claims under policies by not having made any decision until certain dates, and that decisions themselves were “void and of no effect” - plaintiff also sought declarations he satisfied definition of “Total and Permanent Disablement” in policies and orders TAL and MetLife pay him amounts with interest under s 57 *Insurance Contracts Act 1984* - held: no breach of insurers’ duty of good faith and good dealings - plaintiff sustained onus of showing he satisfied definitions of TPD in policies - plaintiff entitled to total and permanent disability benefits.

[Shuetrim](#) (I B)

[From Benchmark 28 April 2015]

Metgasco Ltd v Minister for Resources and Energy [2015] NSWSC 453

Supreme Court of New South Wales

Button J

Judicial review - plaintiff sought judicial review of decision of Minister by delegate to suspend operations approved under Petroleum Exploration License at gas exploration well pursuant to s22(3A) *Petroleum (Onshore) Act 1991* (NSW) - construction of Act and instruments created pursuant to Act - lawfulness of delegate’s decisions - ss3, 22, 22(3A), 22(3A)(b), 22(3B)(b), 22(6), 22(6)(a), 22(6)(b), 22(6)(c), 22(7) & 136A - held: decision to suspend (the first decision) was invalid because it was not preceded by compliance with procedural fairness regime under Act - decision to confirm the first decision was invalid because it purported to confirm a decision that was itself invalid - second decision was also separately invalid on various grounds -

decisions quashed.

[Metgasco](#) (I B C G)

[From Benchmark 28 April 2015]

Savino v Schieven [2015] VSCA 67

Court of Appeal of Victoria

Warren CJ; Ferguson & Kaye JJA

Negligence - motor vehicle accident - motorcyclist injured when his motorcycle collided with motor vehicle driven by respondent - motorcyclist claimed damages against respondent - jury returned verdict that there was no negligence by respondent that caused applicant's injuries - applicant sought leave to appeal on basis jury's verdict not open on evidence adduced at trial - held: jury not bound to find respondent did not operate indicator, check mirrors or undertake head check - respondent did not fail to keep proper lookout - Court not persuaded there was arguable error by jury - no 'real prospect of success' on appeal - leave to appeal refused.

[Savino](#) (I)

[From Benchmark 27 April 2015]

Daunt v Daunt [2015] VSCA 58

Court of Appeal of Victoria

Redlich, Santamaria & Kyrou JJA

Constructive trust - evidence - parents (Mr and Mrs Daunt) were registered proprietors of property - parents had three children - parents transferred property to respondent son and Mr Daunt - appellant son lodged caveat on title to property - appellant claimed respondent owed a fiduciary duty to parents by being power of attorney - appellant claimed respondent exercised undue influence over parents to procure transfer of property to himself to defeat legitimate claims of co-beneficiaries of parents' estate, being appellant and sister - primary judge dismissed proceedings - ss91 & 178 *Evidence Act 2008* - held: trial judge erred in relying on evidence of VCAT's refusal to appoint administrator - determination inadmissible without certificate - respondent rebutted presumption of undue influence - appeal dismissed.

[Daunt](#) (I B)

[From Benchmark 28 April 2015]

Jeffrey and Curnow v Giles; Giles v Jeffrey and Curnow [2015] VSCA 70

Court of Appeal of Victoria

Warren CJ, Tate JA & Ginnane AJA

Damages - defamation - costs - appellants defamed by statements made by respondent - appellants appealed against award of damages as manifestly inadequate - respondent seeks leave to appeal against order she pay appellants' costs of proceeding on basis she was not given opportunity to refer judge to offer of compromise she made - held: damages were so low as to be inappropriate - no error in refusal to award aggravated damages however behaviour relied upon in support of claim for aggravated damages should be taken into account in award of compensatory damages - question of interest to be further argued and determined in pending application under s29 *Civil Procedure Act 2010* - appeal allowed - respondent refused leave to

appeal.

[Jeffrey \(I\)](#)

[From Benchmark 29 April 2015]

Vision Eye Institute Ltd v Kitchen [2015] QSC 66

Supreme Court of Queensland

Applegarth J

Damages - contract - Court gave judgment for second plaintiff company against defendant ophthalmologist for damages for breach of service agreement - assessment of damages - closure of clinics caused by wrongful termination of agreement - whether macular degeneration income should be included in assessment of lost earnings - whether shares in company owned by defendants and held in escrow should be released - held: macular degeneration income included - defendant ceased to be employee under agreement in circumstances where he was a "Bad Leaver" under escrow deed - defendants not entitled to release of escrow shares - damages awarded in sum of \$10,845,476 - restricted securities to be released from escrow on condition plaintiffs entitled to sell shares on behalf of defendants and apply Agreed Proportion of proceeds of sale in reduction of defendant's liability.

[Vision \(I B\)](#)

[From Benchmark 27 April 2015]

CRIMINAL

Executive Summary

R v Seller; R v McCarthy (NSWCCA) - criminal law - conspiracy to dishonestly influence Commissioner of Taxation - exclusion of evidence of ATO officer present at accuseds' examinations - stay refused - appeals dismissed

Summaries With Link

R v Seller; R v McCarthy [2015] NSWCCA 76

Court of Criminal Appeal of New South Wales

Bathurst CJ, Fullerton & Bellew JJ

Criminal law - Australian Crime Commission (ACC) investigated tax minimisation schemes promoted by respondents - transcripts of respondents' examinations disseminated to Commonwealth Director of Public Prosecutions (CDPP) in contravention of directions under *Australian Crime Commission Act 2002* (Cth) - respondents charged with conspiracy to dishonestly influence Commissioner of Taxation - CDPP sought to allow officer of Australian Tax Office to give evidence in criminal proceedings - Supreme Court prohibited officer from

giving evidence and refused stay of criminal proceedings - held: no error in prohibiting officer from giving evidence - officer was present at compulsory examination of accuseds - evidence informed by compulsory examinations - if officer permitted to adduce proposed evidence this would alter accusatorial process inherent in criminal trial in fundamental sense described in *X7 v Australian Crime Commission* [2013] HCA 29 and *Lee v R* [2014] HCA 20 - prosecution had satisfied prosecutorial duties - Crown had not waived legal professional privilege in relation to documents - no unfairness in maintenance of privilege - mere fact of dissemination did not warrant stay - new prosecution team had been appointed - only potential witness privy to material had been excluded - appeals dismissed.

[RvSeller:RvMcCarthy](#)

Constancy

By George Herbert

Who is the honest man?

He that doth still and strongly good pursue,
To God, his neighbour, and himself most true:
Whom neither force nor fawning can
Unpin, or wrench from giving all their due.

Whose honesty is not

So loose or easy, that a ruffling wind
Can blow away, or glittering look it blind:
Who rides his sure and even trot,
While the world now rides by, now lags behind.

Who, when great trials come,

Nor seeks, nor shuns them; but doth calmly stay,
Till he the thing and the example weigh:
All being brought into a sum,
What place or person calls for, he doth pay.

Whom none can work or woo

To use in any thing a trick or sleight;
For above all things he abhors deceit:
His words and works and fashion too
All of a piece, and all are clear and straight.

Who never melts or thaws

At close temptations: when the day is done,
His goodness sets not, but in dark can run:
The sun to others writeth laws,



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And is their virtue; Virtue is his Sun.

Who, when he is to treat
With sick folks, women, those whom passions sway,
Allows for that, and keeps his constant way:
Whom others' faults do not defeat;
But though men fail him, yet his part doth play.

Whom nothing can procure,
When the wide world runs bias from his will,
To writhe his limbs, and share, not mend the ill.
This is the Marksman, safe and sure,
Who still is right, and prays to be so still.

[George Herbert](#)

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