



Friday, 3 July 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)

Tarkine National Coalition v Minister for the Environment (FCAFC) - administrative law - approval of proposed action to develop and operate hematite mine in Tasmania - appeal dismissed (C G)

Arida v Arida (NSWCA) - contract - Heads of Agreement did not relieve respondent from obligation to pay interest under contract for sale of property - appeal allowed (I B)

Prospect Resources Ltd v Molyneux (NSWCA) - contract - subscription agreement - conditions precedent not satisfied - no waiver of satisfaction of conditions precedent by letter - appeal dismissed (I B)

Williams v Pisano (NSWCA) - building and construction - misleading representations made in connection with sale of residential premises did not constitute conduct in trade or commerce - appeal allowed (I B C)

Djakovic v Perez (NSWCA) - motor accidents compensation - primary judge erred in refusing leave to commence proceedings more than three years after accident - appeal allowed (I G)

Byrnes v Hawkesbury City Council (NSWSC) - negligence - slip and fall - Council not liable - appeal against findings of fact dismissed (I)

Hitchens v Zurich Australia Ltd (NSWSC) - insurance - life insurance policies - insurer entitled to avoid policies on grounds of fraudulent misrepresentation and fraudulent non-disclosure (I)

Ling v Pan Pac Investment Pty Limited; Ling v Wu (NSWSC) - contract - fraud - possession - unconscionable conduct - interest payable on loans - judgment for lender in amount to be determined (B)

Housden v Boral Australian Gypsum; Boral Australian Gypsum v Victorian WorkCover Authority (VSCA) - accident compensation - workplace injury - Boral not liable - appeal dismissed (I B G)

Zhong v Melbourne Health (VSCA) - negligence - unrepresented litigant - diagnosis of mental illness resulting in involuntary inpatient treatment - claim against hospital and Melbourne Health dismissed - appeal dismissed (I)

Montclare v Metlife Insurance Ltd (VSC) - insurance - life insurance - fraudulent misrepresentation - insurer entitled to avoid claim (I B)

Summaries With Link (Five Minute Read)

Tarkine National Coalition v Minister for the Environment [2015] FCAFC 89

Full Court of the Federal Court of Australia

Kenny, Jessup & Middleton JJ

Administrative law - appellant challenged Minister's decision to approve proposed action by second respondent to develop and operate hematite mine in north-western Tasmania - 'controlled actions' - 'cumulative impacts' - ss3A, 18, 18A, 19, 20, 20A, 37B, 45, 47, 67, 67A, 75, 82, 83, 130, 133, 134, 136, 139, 140, 145D, 146F & 527E *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC) - s25 *Environmental Management and Pollution Control Act 1994* (Tas) - held: s136 EPBC did not require Minister to consider 'cumulative impacts' of proposal - contention rejected that primary judge erred in not holding that s83 EPBC Act did not 'disapply' Pt 8 EPBC in respect of proposal - imposition of conditions by Minister on approval of proposal was within Minister's power under s134 EPBC - appeal dismissed.

[Tarkine](#) (C G)

[From Benchmark Wednesday, 1 July 2015]

Arida v Arida [2015] NSWCA 170

Court of Appeal of New South Wales

Bathurst CJ, Macfarlan JA & Sackville AJA

Contract - appellants and respondent co-owned property - respondent purchased property at auction from Trustees for sale - purchase not completed on completion date - special condition in contract for sale provided for payment of interest to Trustees if sale not completed on completion date - Heads of Agreement entered between appellants, respondent and Trustees in

order to resolve wider disputes between appellants and respondent - whether Heads of Agreement amended contract of sale to remove respondent's obligation to pay interest unless and until appellants paid money to him pursuant to Heads of Agreement - s66G *Conveyancing Act 1919* - held: primary judge erred in construing Heads of Agreement so as to relieve respondent from obligation to pay interest pursuant contract of sale - Heads of Agreement did not relieve respondent from obligation to pay interest - appeal allowed.

[Arida](#) (I B)

[From Benchmark Monday, 29 June 2015]

Prospect Resources Ltd v Molyneux [2015] NSWCA 171

Court of Appeal of New South Wales

Beazley P; Ward & Leeming JJA

Contract - appellant company and respondent consortium entered subscription agreement under which consortium agreed to subscribe for shares in company's capital - company claimed conditions governing obligation to subscribe were satisfied and that consortium was required to pay - consortium claimed conditions were not satisfied and that it was entitled to terminate subscription agreement - primary judge found company had not reasonably satisfied consortium that conditions precedent had been satisfied and that there was no waiver of satisfaction of conditions precedent - company appealed - held: letter from company to consortium did not constitute waiver of 'conditions precedent' - provision of letter alone insufficient to meet requirement that company 'reasonably satisfy' consortium there was waiver of 'conditions precedent' - no error in exercise of primary judge's discretion to order indemnity costs warranting appellate intervention - appeal dismissed.

[Prospect](#) (I B)

[From Benchmark Tuesday, 30 June 2015]

Williams v Pisano [2015] NSWCA 177

Court of Appeal of New South Wales

Bathurst CJ; McColl & Emmett JJA

Building and construction - trade practices - negligence - plaintiffs purchased house from owner-builder and husband - house was profoundly defective in its construction - sale preceded by false information given by owner-builder and appellant husband to real estate agent which was then passed on with their authority to purchasers - information played significant part in purchasers' decision to buy - purchasers sought damages for reasonable cost of remedying defects - primary judge gave judgment for purchasers - primary judge satisfied sale was a transaction in trade or commerce and that conduct complained of was in trade or commerce - falsity of representations established - mis-statements made in advertising material direct and intended positively to influence reader to buy - misleading conduct induced purchasers to enter contract - reliance established - claim in negligence not made out - held: primary judge erred in concluding that representations constituted conduct engaged in by appellant in trade or commerce - no contravention on the part of appellant of either ss18 or 30 Australian Consumer Law - appeal allowed.

[Williams](#) (I B C)

[From Benchmark Tuesday, 30 June 2015]

Dijakovic v Perez [2015] NSWCA 174

Court of Appeal of New South Wales

Gleeson & Leeming JJA; McCallum J

Motor accidents compensation - applicant injured in motor vehicle accident - respondent was driver - applicant did not commence legal proceedings until date more than three years after the accident - primary judge refused application for to commence proceedings - whether full and satisfactory explanation for delay - applicable monetary threshold - s43A *Motor Accidents Act 1988* - ss3, 60, 66, 82, 85A, 89A, 89C, 90, 91 & 109 *Motor Accidents Compensation Act 1999* held: primary judge's reasoning on 'full and satisfactory' explanation issue contained material errors of fact and failed to take into account relevant matters - primary judge erred in approach to lay and medical evidence in respect of monetary threshold issue - appeal allowed - leave granted to commence proceedings.

[Dijakovic](#) (I G)

[From Benchmark Wednesday, 1 July 2015]

Byrnes v Hawkesbury City Council [2015] NSWCA 173

Court of Appeal of New South Wales

Basten & Emmett JJA; Sackville AJA

Negligence - findings of fact - appellant fell between driveway of premises and sealed roadway - appellant claimed Council carried out work placing loose gravel on crossover in breach of duty of care resulting in slip and fall - primary judge found appellant had failed to establish essential factual foundation for pleaded case because evidence had established neither Council nor its contractors had performed any work on crossover or deposited any material - held: no error in assessment of reliability of evidence - no failure to give sufficient weight to evidence - primary judge did not err in not accepting certain evidence - no error in use of exhibits - appeal dismissed.

[Byrnes](#) (I)

[From Benchmark Friday, 26 June 2015]

Hitchens v Zurich Australia Ltd [2015] NSWSC 825

Supreme Court of New South Wales

White J

Insurance - duty of disclosure - plaintiff and first defendant insurer entered into two life insurance policies - plaintiff suffered accident using power saw - insurer purportedly avoided both policies on ground of misrepresentation and non-disclosure - plaintiff claimed damages that would compensate him for amounts that would be payable under both policies - answers to proposal form questions - held: insurer entitled to avoid policies on grounds of fraudulent misrepresentation and fraudulent non-disclosure - insured had fraudulently misrepresented medical history and breached duty of disclosure - no waiver by insured of duty of disclosure by not making further inquiries - judgment for insurer.

[Hitchens](#) (I)

[From Benchmark Wednesday, 1 July 2015]

Ling v Pan Pac Investment Pty Limited; Ling v Wu [2015] NSWSC 850

Supreme Court of New South Wales

Button J

Contract - fraud - possession - plaintiff lender sought orders against second defendant borrower arising from alleged mortgage default - first defendant company was associated with second defendant and was registered proprietor of property - borrower claimed plaintiff knew or ought to have known that borrower was seeking to borrow funds in aid of fraudulent enterprise - by end of hearing borrower did not resist repayment of loans - refined point of contention whether borrower liable to pay interest on loans - unconscionability - whether any application of *Contracts Review Act 1980* - whether interest should be disallowed on basis it was unlawful penalty - held: plaintiff behaved unconscionably against borrower with regard to interest rates with respect second to fifth loans but not first loan - interest rate on default of first loan did not offend law against penalties - on second, third, fourth and fifth loans lender entitled to rate of interest of 20% from date default - even if Court wrong about principles of unconscionability reliance on Act not permitted because of prohibition contained in s6 - judgment for plaintiff in sum to be determined.

[Ling](#) (B)

[From Benchmark Wednesday, 1 July 2015]

Housden v Boral Australian Gypsum; Boral Australian Gypsum v Victorian WorkCover Authority [2015] VSCA 162

Court of Appeal of Victoria

Tate, Santamaria & McLeish JJA

Accident compensation - plasterer suffered work injury cutting sheets of plasterboard - plaintiff alleged Boral's negligence caused injury - primary judge entered judgment for Boral - plasterer contended trial judge erred in not finding that plasterer cut pieces from plasterboard sheets by methods he described - plasterer also contended as alternative case that trial judge should have decided case on basis of all evidence, and that it should not have turned on pleadings - plasterer contended that even if trial judge was right to find cutting plasterboard on the horizontal was not his dominant method of cutting, he did find plasterer cut it that way some of the time and had erred in finding no negligence or breach of duty by Boral - held: no error in finding plasterer did not cut stack of plasterboard sheets in way he said he did - plasterer did not advance alternative case before trial judge - plasterer not permitted to run alternative case - appeal dismissed.

[Housden](#) (I B G)

[From Benchmark Friday, 26 June 2015]

Zhong v Melbourne Health [2015] VSCA 165

Court of Appeal of Victoria

Santamaria & McLeish JJA, Dixon AJA

Negligence - unrepresented litigant - plaintiff claimed defendants were negligent in diagnosing

him as suffering from a mental illness as result of which he was subjected to involuntary inpatient treatment at hospitals - trial judge dismissed plaintiff's claim - ss12 & 12AA *Mental Health Act 1986* - held: trial judge did not fail to permit plaintiff to make an opening statement - no bias on part of trial judge - no failure to give fair trial or give plaintiff procedural fairness - appeal dismissed.

[Zhong](#) (I)

[From Benchmark Monday, 29 June 2015]

Montclare v Metlife Insurance Ltd [2015] VSC 306

Supreme Court of Victoria

Ginnane J

Insurance - life insurance - plaintiff sued insurer claiming \$1.1 million as life insurance benefit - life insured died by suicide on 22 January 2001- insurer admitted it entered into a contract of insurance with plaintiff on the life of deceased life-insured and that, from 10 June 1999, benefit payable under insurance was \$1.1 million - however insurer contended plaintiff not entitled to payment of sum - held: life insurance cover obtained by plaintiff pursuant to contracts under which he was an insured for purposes of *Insurance Contracts Act 1984* (Cth) - insurer issued insurance and was party to contracts of insurance - life-insured made fraudulent misrepresentation to insurer concerning medical history before contracts entered - misrepresentation had effect as though it had been made by plaintiff - insurer validly avoided contracts of insurance under s29 - proceeding dismissed.

[Montclare](#) (I B)

[From Benchmark Tuesday, 30 June 2015]

CRIMINAL

Executive Summary

Gardener v R (NSWCCA) - criminal law - robbery whilst armed with offensive weapon - carried in conveyance - appeal against sentence dismissed

Summaries With Link

Gardener v R [2015] NSWCCA 170

Court of Criminal Appeal of New South Wales

Price, R A Hulme & Davies JJ

Criminal law - applicant sentenced for offences against ss97(1) & 154A(1)(b) *Crimes Act 1900* of robbery whilst armed with offensive weapon and allowing himself to be carried in car he knew was taken without owner's consent - applicant sentenced to imprisonment for 7 years with non-

parole period of 3 years 6 months, and concurrent term of 1 year 6 months with no non-parole period - applicant sought leave to appeal on grounds concerning mental health, drug addiction and rehabilitation issues - leave granted at hearing of application to add ground asserting that sentence was manifestly excessive - held: Court satisfied primary judge properly carried out task in assessing difficult and conflicting issues arising from serious offence and extensive criminal record on the one hand, and unfortunate, deprived and dysfunctional background together with mental health and substance abuse problems on the other - sentence not manifestly excessive - no error in refusing to defer sentence - appeal dismissed.

[Gardener](#)



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from Beachy Head

By Charlotte Smith

On thy stupendous summit, rock sublime!
That o'er the channel reared, half way at sea
The mariner at early morning hails,
I would recline; while Fancy should go forth,
And represent the strange and awful hour
Of vast concussion; when the Omnipotent
Stretched forth his arm, and rent the solid hills,
Bidding the impetuous main flood rush between
The rifted shores, and from the continent
Eternally divided this green isle.
Imperial lord of the high southern coast!
From thy projecting head-land I would mark
Far in the east the shades of night disperse,
Melting and thinned, as from the dark blue wave
Emerging, brilliant rays of arrowy light
Dart from the horizon; when the glorious sun
Just lifts above it his resplendent orb.
Advances now, with feathery silver touched,
The rippling tide of flood; glisten the sands,
While, inmates of the chalky clefts that scar
Thy sides precipitous, with shrill harsh cry,
Their white wings glancing in the level beam,
The terns, and gulls, and tarrocks, seek their food,
And thy rough hollows echo to the voice
Of the gray choughs, and ever restless daws,
With clamor, not unlike the chiding hounds,
While the lone shepherd, and his baying dog,
Drive to thy turfy crest his bleating flock.

The high meridian of the day is past,
And Ocean now, reflecting the calm Heaven,
Is of cerulean hue; and murmurs low
The tide of ebb, upon the level sands.
The sloop, her angular canvas shifting still,
Catches the light and variable airs
That but a little crisp the summer sea,
Dimpling its tranquil surface.

[Charlotte Smith](#)



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