



Friday 7 November 2014

Weekly Civil Law Review

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

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Executive Summary (1 minute read)

Wellington Capital Ltd v ASIC (HCA) - corporations - responsible entity of managed investment scheme not authorised by scheme constitution to distribute scheme property *in specie* to unit holders (I B G)

ACCC v Air New Zealand Ltd (FCA) - trade practices - price fixing - surcharges on carriage of air cargo - claims against airlines dismissed (B G)

Mhanna v Daoud (NSWCA) - contract - leave to appeal from dismissal of cross-claim refused (I B)

Rubino v Australia and New Zealand Banking Group Ltd (NSWCA) - possession - serious question to be tried - stay of execution of writs (B)

Born Brands Pty Ltd v Nine Network Australia Pty Ltd (NSWCA) - defamation - injurious falsehood - claims by company and designers of baby product failed (I)

Banovic v United Super Pty Ltd (NSWSC) - superannuation - insurance - injured worker entitled to total and permanent disability benefit (I B C)

Courts v Essential Energy (aka Country Energy) (NSWSC) - negligence - independent contractor electrocuted while unloading sheep - authority and occupier liable (I)

GWC Property Group Pty Ltd v Higginson (QSC) - summary judgment - leases - penal clauses of incentive deed unenforceable against guarantors (I B)

Bulk Frozen Foods Pty Ltd v Excell (TASSC) - employment contract - clause restraining employee in relation to taking up other employment not wholly void (I B)

Franklin v Blick (ACTSC) - negligence - damages - collision between cyclists - one cyclist hit by car - failure to keep proper look-out - other cyclist liable (I)

Summaries with links (5 minute read)

Wellington Capital Ltd v Australian Securities and Investments Commission [2014] HCA 43

High Court of Australia

French CJ; Crennan, Kiefel, Bell & Gageler JJ

Corporations - Perpetual was custodian of managed investment scheme - Perpetual appointed by Wellington Capital as its agent to hold scheme property on its behalf - Wellington sold assets of scheme to Asset Resolution (ARL) in consideration of issue of shares in ARL to Perpetual - assets disposed of had publicly stated value of \$90.75 million and represented about 41% of value of assets comprising scheme property - Wellington instructed Perpetual to transfer the ARL shares held by Perpetual to unit holders in the scheme in proportion to number of units held by each unit - transfer effected - ASIC challenged validity of transfer - application was dismissed by primary judge - Full Court of Federal Court allowed appeal - ss9, 124, 231, 601FB(1), 601FC, Ch 5C *Corporations Act 2001* (Cth) - s33(1)(l) *Trusts Act 1973* (Qld) - held: scheme constitution, properly construed, confined return of capital to specified circumstances and did not authorise Wellington to make an in specie distribution of scheme property to unit holders - appeal dismissed.

[Wellington Capital Ltd](#) (I B G)

[From Benchmark 6 November 2014]

ACCC v Air New Zealand Ltd [2014] FCA 1157

Federal Court of Australia

Perram J

Trade practices - price fixing - ACCC sued Air New Zealand and Garuda Indonesia alleging collusive behaviour in fixing of surcharges and fees on carriage of air cargo from overseas into Australia contrary to ss45 & 45A *Trade Practices Act 1974* (Cth) - held: s45 applied only to competition in a market in Australia - ACCC's case was limited (in all but one minor case) to flights from airports outside Australia into airports inside Australia - no market in Australia was involved - surcharges were imposed and collected at origin airports - competition which occurred between airlines and which surcharges interfered with was competition in markets in Hong Kong, Singapore and Indonesia and not competition in any market in Australia - prices may have been affected in

Australia, but that did not mean market in which airlines were competing was located here - actions dismissed.

[ACCC](#) (B G)

[From Benchmark 4 November 2014]

Mhanna v Daoud [2014] NSWCA 376

Court of Appeal of New South Wales

Meagher & Barrett JJA

Contract - leave to appeal - applicant sought leave to appeal interlocutory order of District Court dismissing a cross-claim for failure to comply with direction - failure undisputed - judge had also referred to District Court's lack of jurisdiction - s91(2) *Civil Procedure Act 2005* (NSW) - applicant contended that, because dismissal was in part predicated on a finding that District Court lacked jurisdiction, there had been a dismissal *following a determination on the merits* - therefore, dismissal prevented applicant from pursuing same cause of action in later proceedings - held: order was made under s61(3) - ample grounds for judge to act under s61(3) - no prospects of success on appeal - summons for leave to appeal dismissed.

[Mhanna](#) (I B)

[From Benchmark 5 November 2014]

Rubino v Australia and New Zealand Banking Group Ltd [2014] NSWCA 362

Court of Appeal of New South Wales

Basten, Ward & Emmett JJA

Possession - appellant sought leave to appeal from dismissal of application for stay of execution of writs for possession of adjoining parcels of land - appellant asserted there were unusual features surrounding relevant transactions such that inference should be drawn that bank knew of and participated in a fraud - held: Court satisfied there was sufficient material to indicate arguable case that bank, through its employee, was aware of circumstances that would cause an honest and reasonable person to make further enquiries as to understanding of appellant and husband about transactions, and that bank, through employee, wilfully and recklessly failed to make enquiries - evidence of delay without satisfactory explanation did not bar granting interlocutory relief - appeal allowed - stay of execution of writs granted.

[Rubino](#) (B)

[From Benchmark 31 October 2014]

Born Brands Pty Ltd v Nine Network Australia Pty Ltd [2014] NSWCA 369

Court of Appeal of New South Wales

Basten & Meagher JJA; Tobias AJA

Defamation - product designers established company to sell baby product - designers and company sought damages for defamation arising from television broadcast concerning risks of baby devices - company also sought damages for injurious falsehood - trial judge held company did not discharge onus of establishing it was an excluded corporation within meaning of s9

Defamation Act 2005 (NSW) - trial judge found company had no cause of action in defamation and was not satisfied any imputations were carried - trial judge dismissed claim for injurious falsehood - Court granted applicants leave to appeal from findings on whether defamatory imputations were conveyed, admissibility of expert evidence, defences of substantial truth and contextual truth, and standing of applicant to sue in defamation - held: no error in rejecting claim for injurious falsehood - evidence indicated that corporate applicant had standing to sue as it had fewer than 10 employees - imputations were conveyed - trial judge erred in finding imputations (if conveyed) were not defamatory because they only concerned the product - no error in finding that the contextual implications pleaded by respondent were substantially true - no basis for rejecting defence of contextual truth to imputation - appeal with respect to claim in defamation dismissed - appeal dismissed.

[Born Brands Pty Ltd \(I\)](#)

[From Benchmark 3 November 2014]

Banovic v United Super Pty Ltd [2014] NSWSC 1470

Supreme Court of New South Wales

Hall J

Superannuation - insurance - plaintiff injured in accident while working as labourer - plaintiff claimed a Total and Permanent Disability (TPD) benefit against trustee of superannuation fund and insurer - trust deed and insurance policy provided that, in order to be eligible for TPD benefit, both trustee and insurer must form opinion that claimant was unlikely ever to be able to engage in any occupation for which he was suited by reason of his or her education, training or experience - although it was clear on medical evidence that plaintiff was not fit to return to heavy labouring work, trustee and insurer concluded there was other work for which he had a retained capacity - held: hat no reasonable trustee or insurer, applying the correct test to the available material, could have reached conclusions that trustee and insurer reached - Court satisfied worker satisfied definition of TPD within meaning of insurance policy - worker entitled to be paid relevant amount.

[Banovic](#) (I B C)

[From Benchmark 3 November 2014]

Courts v Essential Energy (aka Country Energy) [2014] NSWSC 1483

Supreme Court of New South Wales

Adamson J

Negligence - joint tortfeasors - plaintiff independent contractor electrocuted when he came into contact with an uninsulated electric power wire while unloading sheep from vehicle - plaintiff claimed damages in negligence from electricity authority and occupier of property - held: authority's failure to take reasonable precaution of constructing line so as to give a ground clearance in accordance with its design of 6ms was negligent - accident would not have happened if power line had had a ground clearance at the relevant location - occupier was in breach of duty by not intervening to instruct plaintiff, through station manager, not to unload sheep at a location

where any part of truck would be under power line - occupier's negligence was material cause of plaintiff's accident - plaintiff contributorily negligent by parking truck under power line - contributory negligence 40% - liability apportioned at two thirds to authority and one third to occupier - damages assessed - judgment for plaintiff.

[Courts \(I\)](#)

[From Benchmark 31 October 2014]

GWC Property Group Pty Ltd v Higginson [2014] QSC 264

Supreme Court of Queensland

Dalton J

Summary judgment - leases - incentive deed - plaintiff owned office premises - predecessor in title let premises to law firm in liquidation - first, second and third defendants guaranteed obligations of law firm pursuant to lease and incentive deed - proceeding involved no claim on lease and no claim against tenant law firm - first second and third defendants were sued as guarantors under incentive deed - plaintiff claimed amount of incentives which law firm received pursuant to provisions of incentive deed and had failed to repay on termination in accordance with the terms of deed - defendants contended provisions pursuant to which plaintiff claimed were penalties and sought summary judgment pursuant to r293 *Uniform Civil Procedure Rules 1999* (Qld) - held: plaintiff had sued upon clauses which were wholly penal and which should not be enforced - no injustice in not enforcing penalty clauses because plaintiff had rights at common law pursuant to lease and guarantees - summary judgment granted.

[GWC Property Group Pty Ltd \(I B\)](#)

[From Benchmark 31 October 2014]

Bulk Frozen Foods Pty Ltd v Excell [2014] TASSC 58

Supreme Court of Tasmania

Blow CJ

Contract - employment contract - confidential information - preliminary question - defendant was employed as general manager at plaintiff's company - plaintiff resigned to take up employment with a competitor of plaintiff - employment contract contained clauses restricting defendant in relation to taking up other employment and requiring him not to use or disclose any of the plaintiff's confidential information - plaintiff sought declaration relevant provisions of contract were valid and enforceable, injunction restraining defendant from contravening certain provisions, and order for delivery up of all property belonging to plaintiff that was in defendant's possession or control - preliminary issue whether clause of employment agreement restricting defendant in relation to taking up of other employment was void - defendant contended clause was void at common law for both uncertainty and unreasonableness - held: clause was not void for uncertainty - clause not wholly void for unreasonableness - question left open whether some of the covenants embodied in clause were void for unreasonableness.



[Bulk Frozen Foods Pty Ltd \(I B\)](#)

[From Benchmark 6 November 2014]

Franklin v Blick [2014] ACTSC 273

Supreme Court of the Australian Capital Territory

Burns J

Negligence - damages - defendant cyclist struck piece of wood in cycle lane causing defendant to collide with plaintiff cyclist - plaintiff fell onto road and was hit by car - no suggestion that driver was negligent - plaintiff sued defendant in negligence - plaintiff submitted defendant was negligent in failing to keep a proper lookout for dangers on cycleway as he was riding his bicycle - held: Court satisfied that if defendant had exercised reasonable care he would have seen and avoided piece of wood - Court satisfied defendant breached his duty of care to the plaintiff, and that the plaintiff's injuries as a consequence of falling from his bike and being struck by a car directly flowed from the defendant's negligence - no contributory negligence - damages assessed - judgment for plaintiff.

[Franklin \(I\)](#)

[From Benchmark 4 November 2014]

A Palinode

By Edmund Bolton

As withereth the primrose by the river,
 As fadeth summer's sun from gliding fountains,
 As vanisheth the light-blown bubble ever,
 As melteth snow upon the mossy mountains:
 So melts, so vanishes, so fades, so withers
 The rose, the shine, the bubble and the snow
 Of praise, pomp, glory, joy - which short life gathers -
 Fair praise, vain pomp, sweet glory, brittle joy.
 The withered primrose by the mourning river,
 The faded summer's sun from weeping fountains,
 The light-blown bubble, vanishéd for ever,
 The molten snow upon the naked mountains,
 Are emblems that the treasures we up-lay
 Soon wither, vanish, fade and melt away.



For as the snow, whose lawn did overspread
The ambitious hills, which giant-like did threat
To pierce the heaven with their aspiring head,
Naked and bare doth leave their craggy seat;
Whenas the bubble, which did empty fly
The dalliance of the undiscernéd wind,
On whose calm rolling waves it did rely,
Hath shipwreck made, where it did dalliance find;
And when the sunshine, which dissolved the snow,
Coloured the bubble with a pleasant vary,
And made the rathe and timely primrose grow,
Swarth clouds withdrawn (which longer time do tarry) -
 Oh, what is praise, pomp, glory, joy, but so
 As shine by fountains, bubbles, flowers or snow?

[Edmund Bolton](#)

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