

Benchmark

Friday, 12 June 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)

Jetivia SA and another v Bilta (UK) Ltd (in liq) (UKSC) - insolvency - pleadings - unlawful means conspiracy to injure - claim not struck out - appeal dismissed (I B)

Sims v Chong (FCAFC) - legal practitioners - advocate's immunity - erroneous summary dismissal of claim - appeal allowed (I B)

State of NSW v McCarthy (NSWCA) - trespass - police officers' entry of premises occupied by respondent was lawful - appeal allowed (I)

Fairfax Media Publications Pty Ltd v Bateman (NSWCA) - defamation - no error in striking out 'Hore-Lacy' pleading - appeal dismissed (I)

GE Commercial Corporation (Australia) Pty Ltd v Wallis and Wallis (NSWSC) - contract - default under facility agreement - assignment of interests to plaintiff by financier - plaintiff entitled to payment of amount by guarantors of amount outstanding (B)

Williams v ATM & CPA Projects Pty Ltd (NSWSC) - contract - no entitlement to commission under agreement for provision of marketing consultancy services (B)

Nicholas v Astute Hire Pty Ltd (NSWSC) - negligence - work injury - leave granted to join insurer under s601G *Corporations Act 2001* (Cth) (I C)

James v Maxwell (QSC) - negligence - motorcyclist injured in collision with motor vehicle on

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bend in dirt road - driver of motor vehicle and insurer liable (I)

Maynard v The Estate of Maynard (QSC) - Wills and estates - succession - evidence husband died while surfing - presumption of death had not yet arisen - wife at liberty to swear to death of husband (B)

Summaries With Link (Five Minute Read)

Jetivia SA and another v Bilta (UK) Ltd (in liq) [2015] UKSC 23

Supreme Court of the United Kingdom

Lord Neuberger, President; Lord Mance, Lord Clarke, Lord Sumption, Lord Carnwath, Lord Toulson & Lord Hodge

Insolvency - pleadings - Bilta (UK) Ltd was English company compulsorily wound up - Bilta's liquidators sued its two former directors, one of which was sole shareholder - liquidators also sued a Swiss company and its chief executive resident in France - the four appellants were alleged to be parties to unlawful means conspiracy to injure Bilta by fraudulent scheme - appellants sought to strike out Bilta's claim on ground Bilta could not maintain proceedings in view of 'ex turpi causa non oritur actio' principle, or that appellants were bound to defeat claims on basis of illegality defence - appellants also claimed insofar as claims based on s213 *Insolvency Act 1986* it could not be invoked as it did not have extra-territorial effect - held: Court of Appeal right to hold that illegality could not be raised by Jetivia or chief executive as defence to Bilta's claim because wrongful activity of Bilta's directors and shareholder could not be attributed to Bilta in proceedings - Court of Appeal right to hold that s213 had extra-territorial effect - appeal dismissed.

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

[From Benchmark Tuesday, 9 June 2015]

Sims v Chong [2015] FCAFC 80

Full Court of the Federal Court of Australia

Mansfield, Siopis & Rares JJ

Summary dismissal - legal practitioners - advocate's immunity - appellant claimed against respondent concerning quality of professional legal services rendered in conduct of District Court proceedings and Supreme Court proceedings (WA claim) - WA claim ultimately struck out - primary judge summarily dismissed appellant's claim against respondent on bases claim was abuse of process and that in any event it was doomed to fail because respondent's conduct protected by advocate's immunity - whether erroneous to summarily dismiss claim under s31A *Federal Court of Australia Act 1976* because not all claims fell within immunity's shadow or because state of authorities did not justify exercise of power under s31A - whether Court satisfied appellant had no reasonable prospect of successfully prosecuting claim - held: Court disagreed with primary judge's conclusions that case as expressed was not reasonably arguable - appeal allowed.

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Sims (I B)

[From Benchmark Wednesday, 10 June 2015]

State of NSW v McCarthy [2015] NSWCA 153

Court of Appeal of New South Wales

Meagher & Gleeson JJA

Trespass - primary judge held appellant liable for damages for trespass to land when four police officers entered premises occupied by respondent - Court granted leave to appeal - ss9, 10 & 201 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) - whether primary judge erred in failing to find officers satisfied requirements in ss9 or 10 relating to exercise of power to enter - whether primary judge should have held that officers' entry unlawful because of failure to provide information required by s201 after exercising power - held: entry of each of the officers was lawfully authorised under ss9 or 10 - s201(2)(b) expressly provided that in case like present information in s201 must be provided after exercise of power - lawfulness of exercise not contingent on subsequent provision of information where information could not reasonably have been provided earlier - notice of contention rejected - appeal allowed.

State (I)

[From Benchmark Thursday, 4 June 2015]

Fairfax Media Publications Pty Ltd v Bateman [2015] NSWCA 154

Court of Appeal of New South Wales

McColl, Basten & Macfarlan JJA

Defamation - respondent alleged defamatory imputations arising from articles published by applicants in newspaper and on websites - applicants sought to plead in reliance on *David Syme & Co Ltd v Hore-Lacy [2000] 1 VR 667* (Hore-Lacy) as alternative way of pleading defence of justification - primary judge found that Hore-Lacy established a separate form of pleading not available in New South Wales and struck out Hore-Lacy defence - applicants sought leave to appeal - rr14.30-14.32 *Uniform Civil Procedure Rules 2005* (NSW) - 'the general law' - ss6 & 24 *Defamation Act 2005* (NSW) - held : in absence of binding authority to contrary, primary judge correct to strike out defence as not complying with pleading practice and procedures in NSW - Court need not consider correctness of reasoning in *Setka v Abbott [2014] VSCA 287* - appeal dismissed.

Fairfax (I)

[From Benchmark Tuesday, 9 June 2015]

GE Commercial Corporation (Australia) Pty Ltd v Wallis and Wallis [2015] NSWSC 704

Supreme Court of New South Wales

Adams J

Contract - plaintiff sued defendants as guarantors of debts of company in own right and as trustee for discretionary trust (customer) - money was advanced under facility agreement discounting rendered invoices - initial financier sold its discounting business to plaintiff assigning and novating its securities to plaintiff - company ceased to trade constituting event of default under facility agreement and the guarantees - plaintiff issued notice to customer terminating

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facility - administrators disposed of company's assets and applied proceeds in reduction of its indebtedness under facility - plaintiff issued notices of demand to defendants requiring them to pay the remaining debt - held: relevant clauses permitted Allianz unilaterally to assign interests to plaintiff whether or not defendants consented and gave prior consent to substitution of plaintiff as party to facility agreement and guarantees - deed between Allianz and plaintiff assigned and novated agreements with customer and defendants' guarantees - judgment for plaintiff.

GE (B)

[From Benchmark Friday, 5 June 2015]

Williams v ATM & CPA Projects Pty Ltd [2015] NSWSC 703

Supreme Court of New South Wales

Ball J

Contract - first and second plaintiffs alleged that pursuant to agreement defendants agreed to pay commission for marketing consultancy services provided in relation to real estate project owned by first defendant - plaintiffs alleged defendants obliged to pay commission calculated at rate of 4 percent on sale price of land together with 4 percent on contract price of building contract which parties anticipated ATM would enter with purchaser - construction of agreement - whether commission only payable if plaintiffs arranged sale within six week period stated in second bullet point - whether commission payable even if the only contract entered into was contract for sale of land - held: on correct construction of agreement plaintiffs not entitled to commission - proceedings dismissed.

Williams (B)

[From Benchmark Tuesday, 9 June 2015]

Nicholas v Astute Hire Pty Ltd [2015] NSWSC 711

Supreme Court of New South Wales

Hall J

Joinder - negligence - work injury - plaintiff employed by defendant in relation to railway station upgrade - plaintiff injured when struck in legs by steel beam and trapped underneath it - plaintiff sued defendant in negligence - principal of project had engaged company (QMC) as main subcontractor - QMC engaged another subcontractor (Ontrack) - defendant sought leave to cross-claim against Ontrack's insurer - insurer opposed application - insurer denied Ontrack had "a liability" within meaning of s601AG *Corporations Act 2001* - insurer also denied insurance contract issued by it to Ontrack Pty Ltd covered any liability that arose immediately before Ontrack's deregistration - held: there was considerable evidence which could establish liability in Ontrack on proposed second cross-claim - it appeared at *prima facie* level that Ontrack held relevant insurance from insurer at relevant time - leave granted to file and serve on insurer proposed cross-claim.

Nicholas (I C)

[From Benchmark Wednesday, 10 June 2015]

James v Maxwell [2015] QSC 149

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Supreme Court of Queensland

Henry J

Negligence - motorcyclist sought damages for injuries to leg in collision on bend in dirt road with motor vehicle driven by first defendant - held: evidence compelled inference that first defendant was travelling too fast to manoeuvre vehicle around bend without encroaching into path of oncoming traffic - collision was entirely due to first defendant's negligent driving - no contributory negligence - second defendant insurer also liable in respect of damages - judgment for motorcyclist.

James (I)

[From Benchmark Thursday, 4 June 2015]

Maynard v The Estate of Maynard [2015] QSC 144

Supreme Court of Queensland

Atkinson J

Wills and estates - succession - circumstances in which Court able to make finding person deceased and allow widow to swear to his death - applicant's husband travelled to Bali and checked into his accommodation but never checked out and was not seen again after he left accommodation to go surfing - fragment of surfboard was recovered by a local dive master that day - husband's body not found - there was evidence husband died while surfing - seven years had not expired so as to give rise to presumption of death - held: in all circumstances Court satisfied applicant should be at liberty to swear to the death of deceased - Court also satisfied grant of letters of administration upon intestacy should be made to applicant for his estate

Maynard (B)

[From Benchmark Thursday, 4 June 2015]

CRIMINAL

Executive Summary

Knowles (a pseudonym) v The Queen (VSCA) - criminal law - child sexual offences - evidence - leave to appeal refused

Haidari v R (NSWCCA) - criminal law - conviction for offence of riot - appeal dismissed

Summaries With Link

Knowles (a pseudonym) v The Queen [2015] VSCA 141

Court of Appeal of Victoria

Ashley, Redlich & Priest JJA

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Criminal law - evidence - appellant found guilty of three charges involving child sexual offences - judge imposed a total effective sentence of seven years' imprisonment fixed non-parole period of five years' imprisonment - appellant sought leave to appeal against conviction - appellant contended a substantial miscarriage of justice caused because part of complainant's evidence that related to count 1 was procured by leading questions and not addressed by directions to jury - appellant also contended verdict of the jury unsafe and unsatisfactory having regard to complainant's evidence and that substantial miscarriage of justice occurred because of failure of applicant's counsel to adduce evidence of applicant's partner in trial of applicant - held: not reasonably arguable that primary judges failure to give particular warning was productive of a substantial miscarriage of justice - no merit in contention that verdict of jury was unsafe and unsatisfactory having regard to complainant's evidence - no failure by Crown to interview or call J as a witness - Court not persuaded choice of counsel not to call J rendered trial unfair or was productive of a miscarriage of justice - leave to appeal refused.

[Knowles](#)

Haidari v R [2015] NSWCCA 126

Court of Criminal Appeal of New South Wales

Gleeson JA; Johnson & Hall JJ

Criminal law - appellant sought extension of time to appeal against conviction for offence of riot under s93B *Crimes Act 1900* - appellant contended admission of evidence of officer identifying appellant from aspects of footage of events within Villawood Detention Centre gave rise to miscarriage of justice - appellant also contended verdict was unreasonable - held: no miscarriage of justice in relation to evidence - Court satisfied it was open to jury to be satisfied beyond reasonable doubt that appellant guilty of offence of which he was convicted - not demonstrated that a jury must, as distinct from might, have entertained a doubt about appellant's guilt - appeal dismissed.

[Haidari](#)



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Doreen

by C.J. Dennis

"I WISH'T yeh meant it, Bill." Oh, 'ow me 'eart
Went out to 'er that ev'nin' on the beach.
I knoo she weren't no ordinary tart,
My little peach!
I tell yeh, square an' all, me 'eart stood still
To 'ear 'er say, "I wish't yeh meant it, Bill."

To 'ear 'er voice! Its gentle sorter tone,
Like soft dream-music of some Dago band.
An' me all out; an' 'oldin' in me own
'Er little 'and.
An' 'ow she blushed! O, strike! it was divine
The way she raised 'er shinin' eyes to mine.

'Er eyes! Soft in the moon; such boshter eyes!
An' when they sight a bloke...O, spare me days!
'E goes all loose inside; such glamour lies
In 'er sweet gaze.
It makes 'im all ashamed uv wot 'e's been
To look inter the eyes of my Doreen.

The wet sands glistened, an' the gleamin' moon
Shone yellor on the sea, all streakin' down.
A band was playin' some soft, dreamy choon;
An' up the town
We 'eard the distant tram-cars whir an' clash.
An' there I told 'er 'ow I'd done me dash.

"I wish't yeh meant it." 'Struth! And did I, fair?
A bloke 'ud be a dawg to kid a skirt
Like 'er. An' me well knowin' she was square.
It 'ud be dirt!
'E'd be no man to point wiv 'er, an' kid.
I meant it honest; an' she knoo I did.

She knoo. I've done me block in on 'er, straight.
A cove 'as got to think some time in life
An' get some decent tart, ere it's too late,
To be 'is wife.
But, Gawd! 'Oo would 'a' thort it could 'a' been



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My luck to strike the likes of 'er?...Doreen!

Aw, I can stand their chuckin' off, I can.
It's 'ard; an' I'd delight to take 'em on.
The dawgs! But it gets that way wiv a man
When 'e's fair gone.
She'll sight no stoush; an' so I 'ave to take
Their mag, an' do a duck fer 'er sweet sake.

Fer 'er sweet sake I've gone and chucked it clean:
The pubs an' schools an' all that leery game.
Fer when a bloke 'as come to know Doreen,
It ain't the same.
There's 'igher things, she sez, for blokes to do.
An' I am 'arf believin' that it's true.

Yes, 'igher things—that wus the way she spoke;
An' when she looked at me I sorter felt
That bosker feelin' that comes o'er a bloke,
An' makes 'im melt;
Makes 'im all 'ot to maul 'er, an' to shove
'Is arms about 'er...Bli'me? but it's love!

That's wot it is. An' when a man 'as grown
Like that 'e gets a sorter yearn inside
To be a little 'ero on 'is own;
An' see the pride
Glow in the eyes of 'er 'e calls 'is queen;
An' 'ear 'er say 'e is a shine champeen.

"I wish't yeh meant it," I can 'ear 'er yet,
My bit o' fluff! The moon was shinin' bright,
Turnin' the waves all yellor where it set—
A bonzer night!
The sparklin' sea all sorter gold an' green;
An' on the pier the band—O, 'Ell!...Doreen!

[C. J. Dennis](#)

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