

Friday, 15 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)

Kijurina (as liquidator of ET Family Pty Ltd) v Taouk (FCA) - corporations - unreasonable director-related transactions - breach of directors' duties (B)

Warton v Yeo (NSWCA) - Wills and estates - costs - 'children' in clause of Will referred both to biological child and step-children - appeal allowed (B)

Pollock v Hicks (NSWCA) - trade practices - accessorial liability - procedural fairness - finding of accessorial liability set aside - appeal allowed (I B C)

Rumble v Liverpool Plains Shire Council (NSWCA) - contempt - failure to comply with judicial orders - appeal dismissed (I B)

Australia & New Zealand Banking Group Ltd v Fink (NSWSC) - contract - loans - no unjust contract - no breach by bank of National Credit Code - judgment for bank (I B)

Rawlings v Rawlings (VSC) - negligence - worker employed by parents - parents did not owe duty of care to avoid inflicting psychiatric injury on worker - claim dismissed (I)

Madden International Ltd v Lew Footwear Holdings Pty Ltd (VSCA) - trade practices - service - strongly arguable claim for misleading and deceptive conduct - writ not set aside - leave to appeal refused (I B)

Italiano v Lake (VSC) - legal practitioners - succession - plaintiff's mother not restrained from

acting for her in proceedings (B)

El-Masri v Molloy (SASCFC) - medical negligence - error in fact-finding process by primary judge - appeal allowed against finding of liability against doctor - matter remitted (I)

Growthpoint Properties Ltd v Commissioner of State Taxation (SASCFC) - taxation - stamp duty payable on transaction which effected entity's transformation into a land rich entity and conferred special interest - appeal dismissed (B)

Commonwealth Bank of Australia v Psevdos (SASC) - real property - mortgage - bank's mortgage over property had priority over defendant's equitable interest (B)

Hammersley v National Transport Insurance (TASFC) - motor vehicle accident insurance policy - insurer could not rely in exclusion clauses - appeal allowed (I B C)

Summaries With Link (Five Minute Read)

Kijurina (as liquidator of ET Family Pty Ltd) v Taouk [2015] FCA 424

Federal Court of Australia

Edmonds J

Corporations - liquidators sought declarations that transfers of parcels of real estate from third plaintiff to defendant's wife, and transfer of another parcel of real estate from fourth plaintiff to defendant's wife were unreasonable director-related transactions under s588FDA *Corporations Act 2001*, uncommercial transactions under s588FB and insolvent transactions under s588FC - plaintiffs also sought declaration that defendant in capacity as director of third plaintiff and as director of fourth plaintiff contravened duties he owed pursuant to ss180, 181, 182 & 183, and that he breached his fiduciary obligations - plaintiffs sought statutory damages, statutory compensation and equitable compensation - whether reasonable person in company's circumstances would not have entered transactions - held: transfers were unreasonable director-related transactions - director breached duties and fiduciary obligations to third and fourth plaintiffs - declarations and orders.

[Kijurina](#) (B)

[From Benchmark Tuesday, 12 May 2015]

Warton v Yeo [2015] NSWCA 115

Court of Appeal of New South Wales

Basten, Ward & Emmett JJ

Wills and estates - succession - costs - testator died in 2011 - probate of Will granted to first respondent - by clause of Will testator gave 25 % of residuary estate to sister with proviso that, should sister die before him, the share be given "to such one of her children as shall survive" testator - sister predeceased testator and was survived by second respondent only child - sister

had been married to second respondent's father - second respondent's father had four children by first marriage - testator's sister raised the four children as step-children and to testator's knowledge treated them as her own children - primary judge declared that on proper construction of clause the whole of sister's share of deceased's residuary estate passed to her only natural child - two step-children appealed - appropriate construction to be given to clause of Will of testator - held: "children" referred both to sister's biological child and her four step-children - appeal allowed - first respondent's application for indemnity for costs of appeal proceedings rejected - costs of Will construction dispute were testamentary expenses - estate had been partially distributed - parties' costs of appeal to be paid out of proceeds of sale of testator's retirement village to extent indicated by Court.

[Warton](#) (B)

[From Benchmark Friday, 8 May 2015]

Pollock v Hicks [2015] NSWCA 122

Court of Appeal of New South Wales

Macfarlan, Emmett & Gleeson JJ

Trade practices - self-represented litigant - company engaged respondent to undertake earthmoving work - appellant and husband were shareholders and directors of company - respondent sued company, appellant and husband claiming liquidated sum for work done at direction of husband - respondent filed amended statement of claim seeking damages for misleading representations by husband in contravention of *Australian Consumer Law* and *Fair Trading Act 1987* - respondent alleged appellant "involved" in contraventions and was liable for his loss - primary judge found in respondent's favour and ordered appellant to pay damages to respondent - appellant appealed - appellant contended primary judge erred in finding she was "involved" in husband's conduct and that she was denied procedural fairness - duty of Court of unrepresented litigants - held: primary judge applied incorrect test for accessory liability - no basis for finding appellant was intentional participant in husband's unconscionable conduct or any false or misleading conduct by him - finding of accessory liability set aside - procedural fairness required that primary judge ascertain whether appellant asking for adjournment by her responses in relation to amended pleading - appeal allowed.

[Pollock](#) (I B C)

[From Benchmark Monday, 11 May 2015]

Rumble v Liverpool Plains Shire Council [2015] NSWCA 125

Court of Appeal of New South Wales

Beazley P; McColl & Basten JJA

Contempt - applicants owned used car business - cars and parts stored on property owned by first applicant - Land and Environment Court judge issued orders for removal of cars and parts with exception for cars own by residents of property - applicants did not comply - primary judge found applicants in contempt of court - applicants sought leave out of time to appeal - applicants contended Land and Environment Court judge erred finding both applicants "owned and occupied" property whereas second applicant neither owned it nor lived there - applicants sought to challenge convictions on basis orders not served properly and primary judge erred in

finding business run at property - applicants challenged constitutional validity of laws establishing local government in NSW and Council's powers to restrain use of private property and sought referral of constitutional matters to High Court - held: once order made, liability depended on the judicial order and not its legal basis - even if orders set aside, failure to comply with them was contempt - no basis to impugn constitutional basis or validity of Local Government Act 1993 - appeal dismissed.

[Rumble](#) (I B)

[From Benchmark Wednesday, 13 May 2015]

Australia & New Zealand Banking Group Ltd v Fink [2015] NSWSC 506

Supreme Court of New South Wales

Adamson J

Contract - bank sought judgment against defendants for money they owed under two loans - loans secured by property - order for possession in respect of property previously made following bank's application for summary judgment - whether any basis other than that raised in summary judgment proceedings for relief to be granted under *Contracts Review Act 1980* (NSW) - whether interest provisions in Third Business Loan and Overdraft Facility void for uncertainty - whether defendants entitled to relief pursuant to National Credit Code (Code) or Act in respect of Third Business Loan and Overdraft Facility - whether Code was incorporated into Third Business Loan - whether bank breached Code and if so defendants suffered any damage - held: claim for relief under Act rejected - bank entitled to full amount of money owing under loans - relief under the Act in respect of Third Business Loan excluded by s6 - nothing unjust about Third Business Loan - interest provisions not void for uncertainty - defendants not entitled to relief under Code - Court not satisfied bank breached Code - defendants did not establish any loss - judgment for bank.

[ANZ](#) (I B)

[From Benchmark Friday, 8 May 2015]

Rawlings v Rawlings [2015] VSC 171

Supreme Court of Victoria

Dixon J

Negligence - workplace injury - employer's duty of care - plaintiff carpenter suffering from major depressive disorder was employed by his parents (the defendants) in building business - plaintiff claimed that mother directed him to undertake work for which he was not trained or experienced and that the significant stress of undertaking the work caused his psychiatric injury - plaintiff sought leave pursuant to s135A(4)(b) *Accident Compensation Act 1985* to bring common law claim for damages against employer - County Court judge found for plaintiff - employer appealed against rejection of defence that worker's application statute barred - Court of Appeal dismissed appeal - unusual nature of employment relationship overlaid with familial relationship - no perceived risk of psychiatric injury - employer under insolvency - employment stress intertwined with familial stress - nature of employment - held: defendants did not owe plaintiff duty to use reasonable care to avoid inflicting psychiatric injury on him - claim dismissed.

[Rawlings](#) (I)

[From Benchmark Thursday, 7 May 2015]

Madden International Ltd v Lew Footwear Holdings Pty Ltd [2015] VSCA 90

Court of Appeal of Victoria

Mandie & Beach JJA; Dixon AJA

Trade practices - service - applicant (Madden) supplied footwear to respondents (Lew) pursuant to written Licence Agreement - Lew alleged Madden engaged in misleading and deceptive conduct under *Trade Practices Act 1974* (Cth) and claimed damages - Madden incorporated in Hong Kong and wholly owned subsidiary of company in New York - Madden had no offices or employees in Australia - statement of claim served on Madden in Hong Kong - Madden sought that writ be set aside - primary judge dismissed application on basis Lew's claims fell within r7.01(1) *Supreme Court (General Civil Procedure) Rules 2005* and that Lew had a 'strong arguable case' of misleading and deceptive conduct - Madden sought leave to appeal - held: Madden's appeal did not have reasonable prospect of success - open to primary judge to conclude Lew's misleading and deceptive conduct claim strongly arguable - leave to appeal refused.

[Madden](#) (I B)

[From Benchmark Tuesday, 12 May 2015]

Italiano v Lake [2015] VSC 189

Supreme Court of Victoria

Rush J

Legal practitioners - succession - defendant sought to restrain plaintiff from retaining her mother or mother's domestic partner from acting on her behalf in proceeding - defendant submitted mother and domestic partner were conflicted between obligations to their client and overarching responsibility to court and to the administration of justice - held: a fair-minded, reasonably informed member of public would not conclude proper administration of justice required mother and her domestic partner to be prevented from acting for plaintiff - a fair-minded, reasonably informed member of public would consider on balance the mother should continue to act - application dismissed.

[Italiano](#) (B)

[From Benchmark Tuesday, 12 May 2015]

El-Masri v Molloy [2015] SASCF 63

Full Court of the Supreme Court of South Australia

Kourakis CJ; Blue & Bampton JJ

Negligence - first respondent consulted doctor in 2005 regarding asthma - after receiving advice about asthma first respondent claimed she asked about menopause and told doctor her periods were changing - at time of consultation it was not known first respondent 13 weeks pregnant - first respondent alleged that as a result of doctor's negligence during consultation she did not know she was pregnant until 2006 - first respondents' son born with Trisomy 21 - primary judge found doctor negligent on basis of expert opinion in failing to obtain history, conduct examination and make diagnosis either at consultation or follow-up - s41 *Civil Liability Act 1936*

- held: primary judge's reasons not underpinned by reasoning process which linked and justified findings - reasons did not explain primary judge's view that first respondent's evidence was so reliable - failure in fact-finding process by primary judge - finding of negligence set aside - failure to assess defence witnesses stymied Court from drawing its own inferences of fact, determining issues and correct - judgment - appeal allowed - matter remitted.

[El-Masri](#) (I)

[From Benchmark Friday, 8 May 2015]

Growthpoint Properties Ltd v Commissioner of State Taxation [2015] SASCFC 65

Full Court of the Supreme Court of South Australia

Kourakis CJ; Blue & Bampton JJ

Taxation - stamp duty - trustee of trust issued 50.1% of total units in trust to appellant - appellant increased holdings to 76.18% - Commissioner charged appellant with stamp duty on transaction - Treasurer disallowed objection - primary judge dismissed appeal against Treasurer's decision - whether land rich entity provisions contained in Pt 4 *Stamp Duties Act 1923* (SA) applied to transaction whereby person acquired a majority interest in company or unit trust that was not a land rich entity before acquisition but became land rich entity as result of transaction - held : manifest purpose of Pt 4 was to charge with stamp duty a person who had been left with significant interest in private land rich entity as result of transaction - purpose of s95 to demarcate between acquisitions which would be levied at applicable rate to market securities and chargeable at significantly higher rate applicable to conveyances of land - transaction which at same time effected entity's transformation into land rich entity and conferred a significant interest in that entity fell within s95 - appeal dismissed.

[Growthpoint](#) (B)

[From Benchmark Wednesday, 13 May 2015]

Commonwealth Bank of Australia v Psevdos [2015] SASC 66

Supreme Court of South Australia

Parker J

Real property - bank loaned money to registered proprietor of land - registered proprietor granted mortgage over land to bank - defendant then loaned money to registered proprietor - registered proprietor granted defendant mortgage in registrable form - defendant lodged caveat claiming equitable interest as mortgagee over land - bank became aware of caveat and amended mortgage to be subject to defendant's caveat to enable registration - bank's mortgage registered subject to caveat - bank sought declaration its equitable interest had priority over any equitable interest which defendant held - held: bank's mortgage had priority - better equity lay with bank - caveat's lodgement and registration of bank's mortgage subject to caveat did not disturb priority - costs to be paid by defendant on indemnity basis.

[Commonwealth](#) (B)

[From Benchmark Wednesday, 13 May 2015]

Hammersley v National Transport Insurance [2015] TASFC 5

Full Court of the Supreme Court of Tasmania

Blow CJ; Porter & Pearce JJ

Insurance - motor vehicle accident insurance policy - exclusion clauses - second appellant company operated fleet of trucks - Kellera held policy of insurance issued by respondent insurer - first appellant, in course of employment by Kellera, was driving one of its prime movers - prime mover was towing trailer on which there was an excavator - excavator was positioned in unusual way - top of excavator collided with railway overpass causing damage - State of Tasmania owned overpass - State sued first appellant and Kellera for damages for negligence - appellants instituted third party proceedings claiming indemnity from the insurer - drivers covered by policy - primary judge gave judgment for State against appellants - primary judge dismissed appellants' claim against insurer - appellants appealed - held: Court satisfied overloading of trailer was neither intended, foreseen, looked for, expected, nor brought about by design - overloading was accidental within meaning of policy - liability under policy not excluded - vehicle not 'being used in an unsafe or unroadworthy condition' within meaning of exclusion - Court satisfied there was not any recklessness or reckless failure by first appellant that would entitle insurer to rely upon exclusion - appeal allowed - order dismissing third party proceedings set aside - judgment for appellants against insurer.

[Hammersley](#) (I B C)

[From Benchmark Friday, 8 May 2015]

CRIMINAL

Executive Summary

R v Capaldo (SASCFC) - criminal law - possession of firearm - discretion to decline to suspend sentence miscarried - appeal allowed

Summaries With Link

R v Capaldo [2015] SASCFC 56

Full Court of the Supreme Court of South Australia

Gray, Sulan & Kelly JJ

Criminal law - police searched residential premises and seized pistol - appellant pleaded guilty to aggravated possession of class H firearm while not holding licence, possession of class H firearm with defaced, altered or removed characters, failing to keep class H firearm secured and failing to store ammunition in locked container separately from firearm - appellant sentenced to one year and six months imprisonment with a non-parole period of five months - head sentence not challenged - whether sentence should be suspended - ss11(1) & 24A(7)(b) *Firearms Act 1977* - held: judge's questioning of appellant's counsel was inappropriate - judge demonstrated pre-judgment and conduct giving rise to apprehension of bias - judge sentenced on

Benchmark

misunderstanding of fact - head sentence was merciful and should not be interfered with - discretion to decline to suspend sentence miscarried - appellant's mental state and personal circumstances powerful mitigating factors - permission to appeal granted - appeal allowed - appellant resentenced - term of imprisonment suspended upon entry into supervised 3 year good behaviour bond.

[Capaldo](#)

Serenity

By Edward Rowland Sill

Brook,
Be still,—be still!
Midnight's arch is broken
In thy ceaseless ripples.
Dark and cold below them
Runs the troubled water,—
Only on its bosom,
Shimmering and trembling,
Doth the glinted star-shine
Sparkle and cease.

Life,
Be still,—be still!
Boundless truth is shattered
On thy hurrying current.
Rest, with face uplifted,
Calm, serenely quiet;
Drink the deathless beauty—
Thrills of love and wonder
Sinking, shining, star-like;
Till the mirrored heaven
Hollow down within thee
Holy deeps unfathomed,
Where far thoughts go floating,
And low voices wander
Whispering peace.

[Edward Roland Sill](#)

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