



Friday 17 October 2014

Weekly Civil Law Review

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

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Executive Summary (1 minute read)

Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq) (FCAFC) - income tax - liquidators' obligation to retain amount from sale of property only arose after assessment issued - appeal dismissed (B G)

Grima v RFI (Aust) Pty Ltd (NSWCA) - negligence - worker injured unloading goods from truck - apportionment of liability between joint tortfeasors (I)

Ho v Fordyce (ex parte) (NSWSC) - solicitors' costs - contention of false creation of costs agreements - Anton Pillar order granted (I B)

Sundollar Pty Ltd v Consumer Trader and Tenancy Tribunal of NSW (NSWSC) - judicial review - no denial of procedural fairness in CTTT decision (I C G)

Visy Paper Pty Ltd v Glass Granulates Pty Ltd (NSWSC) - equity - no breach of supply agreement - declaration and specific performance refused (I B C)

Warren v Maclean-Lower Clarence Services Club Ltd (NSWSC) - damages - assault causing brain injury - damages assessed at \$1,708,309 (I)

Cairns and Hinterland Hospital and Health Service v JT by JT's Guardian (QSC) - health law - *parens patriae* - withdrawal of treatment in patient's best interests (I)



Kasimoglu v Embleton Motor Co Pty Ltd v St Kilda Beach Taxi School and Staffing Pty Ltd (WASCA) - contract - sub-lessee of taxi plate required to deliver up plate to lessor and pay account of profits (I B)

Sims v Jooste [No 2] (WASC) - defamation - failure to prove publication of words in internet chat room to third party - action dismissed (I B)

Summaries with links (5 minute read)

Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq) [2014] FCAFC 133

Full Court of the Federal Court of Australia

Edmonds, Collier & Davies JJ

Income tax - liquidators of Australian Building Systems (ABS) caused it to sell property during year ended 30 June 2012 - ABS made capital gain on sale which entered into calculation of ABS' assessable income of that year - common ground that assessment of taxable income calculated by reference to such capital gain would, in fullness of time, be issued to ABS, not to liquidators - Commissioner found that s254(1)(d) *Income Tax Assessment Act 1936* (Cth) obliged liquidators to retain from proceeds of sale an amount sufficient to pay tax to be assessed in respect of sale of the property in the period prior to the issue of an assessment - primary judge held obligation to retain only arose after the issue of an assessment - held: primary judge correct to find s254(1)(d) only imposed an obligation of retention once a relevant assessment had issued - appeal dismissed.

[Commissioner of Taxation](#) (B G)

[From Benchmark 10 October 2014]

Grima v RFI (Aust) Pty Ltd [2014] NSWCA 345

Court of Appeal of New South Wales

Meagher, Barrett & Emmett JJA

Negligence - joint tortfeasors - worker injured while unloading goods from truck which been loaded by RFI - worker alleged RFI loaded truck incorrectly and unsafely – RFI denied negligence and alleged worker negligently contributed to his own loss - RFI cross-claimed against worker's employer alleging it failed to provide safe workplace or to instruct worker in proper methods of unloading truck - primary judge held RFI's failure to provide restraining brace to prevent fall of goods breached duty to load truck properly - employer also breached duty by failing to formulate adequate system and instructions - responsibility apportioned 50% to RFI and 50% to employer - no contributory negligence - finding of negligence by RFI not challenged - held: finding of negligence by employer was correctly made but primary judge's equal apportionment plainly unreasonable - appropriate apportionment was 75% to RFI and 25% to employer - no error in



finding no contributory negligence or contribution in respect of costs - appeal allowed in part - cross-appeal dismissed.

[Grima \(I\)](#)

[From Benchmark 16 October 2014]

Ho v Fordyce (ex parte) [2014] NSWSC 1404

Supreme Court of New South Wales

Rein J

Equity - solicitor commenced proceedings for assessment of costs - clients asserted there were no costs agreements between them and the solicitor - clients sought order similar to Anton Pillar order to obtain access to and make of copies of material on solicitor's computer - clients were concerned that if they sought discovery in the normal manner solicitor may be able to alter or destroy evidence as to date of creation of various costs agreements - held: Court not satisfied there had been false creation of documents but there was some evidence to support the contention - for client to have to present normal application for discovery could act to clients' disadvantage forensically - ambit of information sought was narrow - proposed orders specifically detailed what was required of recipients - consequences of orders would cause little or no prejudice to solicitor if there had been no recent creation - Anton Pillar order made.

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

[From Benchmark 15 October 2014]

Sundollar Pty Ltd v Consumer Trader and Tenancy Tribunal of NSW [2014] NSWSC 138

Supreme Court of New South Wales

Hidden J

Judicial review - Sundollar conducted business constructing swimming pools - Sundollar entered contract with second defendant to build pool - second defendant sought compensation in Consumer, Trader and Tenancy Tribunal from Sundollar for alleged defects in construction - Tribunal delivered decision in favour of second defendant - Sundollar sought to quash decision on basis of denial of procedural fairness - held: ground for relief not established on basis of member's "defects assurance" observation - even if ground had been made out, relief should be refused in exercise of discretion because asserted procedural unfairness did not affect outcome - ground for relief not established on basis that Tribunal permitted second defendant's partner and another person to participate as advocates, effectively representing second defendant - way in which matter proceeded unconventional but both parties had full opportunity to present their case - summons dismissed.

[Sundollar Pty Ltd \(I C G\)](#)

[From Benchmark 15 October 2014]

Visy Paper Pty Ltd v Glass Granulates Pty Ltd [2014] NSWSC 1387

Supreme Court of New South Wales



Sackar J

Equity - recycler supplied glass materials to glass business - recycler sought declaration that glass business had breached supply agreement - sought specific performance and damages - glass business denied breach and contended that, even if it did breach agreement, supplier would suffer no damage if Court denied order for specific performance - glass business also asserted agreement was void for illegality and that it was entitled to refuse loads containing asbestos or fibro - proper construction of supply agreement - definition of *rubbish* - *ejusdem generis* principle - held: reasonable to infer there was some asbestos more probably than not in each of the relevant loads rejected - definition of rubbish did not include asbestos contaminated material - glass business not obliged to receive any load which contained material which was other than benign or non-hazardous - glass business not obliged to take the relevant loads - judgment for glass business.

[Visy Paper Pty Ltd](#) (I B C)

[From Benchmark 14 October 2014]

Warren v Maclean-Lower Clarence Services Club Ltd [2014] NSWSC 1374

Supreme Court of New South Wales

Schmidt J

Damages - plaintiff suffered brain injury when assaulted by second and third defendants at first defendant club - claim against first defendant not pursued - other defendants did not defend claim - plaintiff received default judgment for unliquidated damages - plaintiff sought damages in circumstances where neither defendant was in a financial position which would enable any orders made in plaintiff's favour to be satisfied - held: Court satisfied on the evidence that an order for substantial damages must be made in plaintiff's favour - Court satisfied that assault fell within exception in s3B *Civil Liability Act 2002* (NSW) which excludes application of the Act to intentional acts done with intent to cause death or injury, apart, relevantly, from s18 interest on damages - plaintiff sought no order as to interest - damages assessed - defendants ordered to pay plaintiff damages in sum of \$1,708,309.

[Warren](#) (I)

[From Benchmark 13 October 2014]

Cairns and Hinterland Hospital and Health Service v JT by JT's Guardian [2014] QSC 251

Supreme Court of Queensland

Henry J

Health law - withdrawal of patient treatment - *parens patriae* jurisdiction - patient unconscious in hospital after suffering hypoxic injury - patient had previously expressed wish to wife and family that he did not wish to remain in such state - hospital sought orders that it was in patient's best interests that treatment and nutrition be discontinued and resuscitation not be administered, ought not occur, would be inconsistent with good medical practice, and that cessation would be lawful - held: medical practitioners of universal opinion there was no prospect of improvement - consistent

with good medical practice to withdraw life-sustaining supportive treatments - Court readily inferred that, were patient able to comprehend devastating impact that his living death was having upon his loved ones, he plainly would not want situation to continue - patient could no longer be taken to be consenting to invasive care being imposed upon his body - no longer in patient's best interests for care to continue - Court did not consent on patient's behalf to continuation of such care - withdrawal of care would be lawful - its continuation would be unlawful - orders granted.

[Cairns and Hinterland Hospital and Health Service](#) (I)

[From Benchmark 14 October 2014]

Kasimoglu v Embleton Motor Co Pty Ltd [2014] WASCA 182

Court of Appeal of Western Australia

Newnes & Murphy JJA; Edelman J

Default judgment - respondent alleged appellants breached agreements for lease of taxi plates - no defence filed - default judgment - appellants applied to set aside default judgment - Master concluded that, in the absence of an adequate explanation as to circumstances in which default judgment came to be entered, and some evidence that appellants had an arguable defence to the claim, application should be dismissed - appellants contended Master erred in declining to admit two affidavits and in exercise of discretion to dismiss application - appellants also sought to adduce additional evidence on appeal to establish they had an arguable defence - held: open to Master to decline to admit affidavits - additional evidence did not assist appellants - not in interests of justice to admit additional evidence - appeal dismissed

[Kasimoglu](#) (I B)

[From Benchmark 16 October 2014]

Sims v Jooste [No 2] [2014] WASC 373

Supreme Court of Western Australia

K Martin J

Defamation - self-represented plaintiff claimed he was defamed by defendant by words appearing in internet chat forum - plaintiff had previously been executive director of company - words complained of concerned reckless disregard for shareholders' interests - publication - justification defence - s184(2) *Corporations Act 2001* (Cth) - held: plaintiff did not establish that words complained had been read and understood by at least one other person - establishing publication was essential ingredient of a cause of action in defamation against defendant - need for plaintiff to show publication of words to third person other than himself was clearly explained to plaintiff - plaintiff did not establish publication of the words - action dismissed.

[Sims](#) (I B)

[From Benchmark 15 October 2014]



Aedh Wishes for the Cloths of Heaven

By W. B. Yeats

Had I the heavens' embroidered cloths,
Enwrought with golden and silver light,
The blue and the dim and the dark cloths
Of night and light and the half light,
I would spread the cloths under your feet:
But I, being poor, have only my dreams;
I have spread my dreams under your feet;
Tread softly because you tread on my dreams.

[W. B. Yeats](#)

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