

Friday, 25 September 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)

Deputy Commissioner of Taxation (Superannuation) v Ryan (FCA) - superannuation - trustees of SMSF lent money to themselves – breaches of *Superannuation Industry (Supervision) Act* – pecuniary penalties (I B C)

Bates v Cooke (NSWCA) - succession - adult son of deceased refused family provision order out of notional estate - appeal dismissed (B)

Yu v Cao (NSWCA) - costs - defamation - non-party costs order not warranted - appeal allowed (I)

Dionisatos (for the Estate of the late George Dionysatos) v Acrow Formwork & Scaffolding Pty Ltd (NSWCA) - negligence - dust diseases - erroneous deduction of compensation under *Workers' Compensation (Dust Diseases) Act 1942 (NSW)* from damages awarded under s15B *Civil Liability Act 2002 (NSW)* - appeal allowed - cross-appeal dismissed (I C G)

ERA Polymers Pty Limited v Pacific Urethanes Pty Ltd (NSWCA) - contract - confidential information - no error in construction of deed - summons dismissed (I C)

Capogreco v Rogerson (NSWSC) - contract - misleading and deceptive conduct - second defendant not authorised to sell plaintiffs' shares in racehorse at private sale - plaintiffs entitled to declarations regarding respective ownership of shares in horse and to an account from second defendant - misleading and deceptive conduct claims dismissed (I B)

National Australia Bank Ltd v Swed (No 2) (NSWSC) - banker and customer - wife stole money from husband's account - husband not responsible (I B)

Application by Elizabeth Marie Robinson (NSWSC) - succession - gift to son unless he died before attaining a vested interest - construction of will - intention of testator - *vested* meant vested in possession (B)

In the matter of Italian Forum Limited (subject to a deed of company arrangement) (NSWSC) - sale of land - judicial directions to administrator of vendor that he was justified in making certain payments under the contract of sale (C)

Frankel v Paterson (NSWSC) - common property in strata scheme unilaterally appropriated by another unitholder after exchange - rule in *Flight v Booth* - no substantial misdescription of property - sale to proceed (B C)

Erlich v Leifer (VSC) - negligence - sexual abuse - school directly and vicariously liable for first defendant's conduct - damages - exemplary damages (I)

Willner v Dept of Economic Development, Jobs, Transport and Resources (VSC) - freedom of information - artist sought CCTV film from train carriage to use in artwork - arguable error of law in refusing film - leave to appeal granted (I G)

Agripower Australia Ltd v Queensland Engineering & Electrical Pty Ltd (QSC) - security of payments - contract between parties was illegal - first defendant not entitled to progress payments - adjudicator's decision void (C)

Larussa Pastoral Holdings Pty Ltd v Carr (WASCA) - trusts and succession - Master ordered trustee to produce documents to administratrix of deceased estate - stay of orders pending appeal refused (B)

Miles v Campus Living Villages Murdock Pty Ltd (WASC) - tenant sought injunction against eviction - foreshadowed Supreme Court proceedings - injunction granted (I B)

Quarmby v Oakley (TASFC) - pleadings - claim for damages for unnecessary and vexatious lodgement of caveats lodged in support of judgment struck out - appeal dismissed (B)

Adhesive Pro Pty Ltd v Blackrock Supplies Pty Ltd (ACTSC) - service of unsealed copy of application to set aside statutory - service not as required by *Corporations Act* - proceedings dismissed (I B C)

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Summaries With Link (Five Minute Read)

Deputy Commissioner of Taxation (Superannuation) v Ryan [2015] FCA 1037

Federal Court of Australia

Edelman J

Superannuation - husband and wife were trustees and members of self-managed superannuation fund – they caused the fund to lend money to themselves - s65 *Superannuation Industry (Supervision) Act 1993* (Cth) - contravened sole purpose test - s62 *Superannuation Industry (Supervision) Act 1993* (Cth) - failed to prepare a plan to address the excess in-house assets of the fund - s84 *Superannuation Industry (Supervision) Act 1993* (Cth) - contraventions were *serious contraventions* - s196(4) *Superannuation Industry (Supervision) Act 1993* (Cth) - husband and wife each ordered to pay monetary penalties of \$20,000 to the Commonwealth, in monthly instalments over three years.

[Deputy](#) (I B C)

[From Benchmark Wednesday, 23 September 2015]

Bates v Cooke [2015] NSWCA 278

Court of Appeal of New South Wales

Meagher & Leeming JJA; Sackville AJA

Succession - family provision - mirror wills - appellant was adult son of deceased - respondent was deceased's husband and appellant's stepfather - respondent was executor named in deceased's Will - appellant sought family provision order pursuant to Pt 3.2 *Succession Act 2006* (NSW) - common ground there were no significant assets in deceased's estate but that there were substantial assets which could be designated as notional estate - appellant also sought order designating property as notional estate - primary judge dismissed summons - appellant contended primary judge wrongly disregarded appellant's parlous financial position and wrongly found there was no real risk respondent would change Will to exclude appellant as beneficiary - whether appellant precluded from claiming provision due to improvident investment decisions - s9 *Family Provision Act 1982* (NSW) - ss57, 59, 60, 73, 87; Pt 3. & Pt 3.3 *Succession Act 2006* (NSW) - held: primary judge erred in approach to claim by elevating element which to be weighed in mix of factors into principle which disqualified an adult claimant - however primary judge's alternative approach was answer to claim - open primary Judge to accept evidence there was no real risk respondent would change his Will to reduce appellant's entitlement - appeal dismissed.

[Bates](#) (B)

[From Benchmark Thursday, 17 September 2015]

Yu v Cao [2015] NSWCA 276

Court of Appeal of New South Wales

McCull JA, Sackville AJA & Adamson J

Costs - non-party costs orders - defamation - applicant sought to appeal from decision of District Court ordering him to indemnify respondent for costs order made against respondent at

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defamation trial and also for costs paid or payable by respondent to former solicitor in connection with trial - primary judge had concluded it was interests of justice to make non-party costs orders because it was applicant's conduct which had brought about defamation proceedings - s98 *Civil Procedure Act 2005* (NSW) - held: primary judge erred in exercise of discretion by focusing too narrowly on commencement of litigation rather than wider circumstances - circumstances of case did not warrant exercise of exceptional power to make non-party costs order against applicant in interests of justice - appeal allowed.

[Yu \(I\)](#)

[From Benchmark Friday, 18 September 2015]

ERA Polymers Pty Limited v Pacific Urethanes Pty Ltd [2015] NSWCA 283

Court of Appeal of New South Wales

Beazley P; Macfarlan & Meagher JJA

Contract - applicant sought declaration it was sole beneficial owner of formulations (confidential information) - applicant alleged respondent used confidential information - applicant sought orders restraining respondent from continuing to use the confidential information - applicant sought leave to appeal from refusal of leave to amend statement of claim and summarily dismissing proceedings - whether primary judge erred in construing deed of settlement and release, and an attached Toll manufacturing deed which was part of the deed of settlement and release - held: primary judge correct in construction of clauses of deed of settlement and release and manufacturing deed - in effect applicant had sought to vindicate rights anterior to deed - primary judge correct to dismiss proceedings - summons dismissed.

[ERA \(I C G\)](#)

[From Benchmark Monday, 21 September 2015]

Dionisatos(for the Estate of the late George Dionysatos) v Acrow Formwork & Scaffolding Pty Ltd [2015] NSWCA 281

Court of Appeal of New South Wales

Basten, Macfarlan & Gleeson JJA

Negligence - dust diseases - statutory interpretation - worker employed by first respondent on construction of Sydney Opera House - worker suffered from mesothelioma and died in 2012 - .before death worker brought claim in Dust Diseases Tribunal against employer claiming illness caused by exposure to asbestos dust and fibres and that employer negligent by permitting his exposure - worker also alleged employer breached statutory duties and contractual obligations. - Tribunal upheld estate's claim against employer and awarded damages including component pursuant to s15B *Civil Liability Act 2002* (NSW) for worker's loss of capacity to provide gratuitous domestic services for his wife - Tribunal deducted amount from s15B damages to reflect value of compensation to widow under *Workers' Compensation (Dust Diseases) Act 1942* (NSW) - parties appealed - held: .employer's cross-appeal with respect to liability dismissed - Tribunal erred in deducting from s15B damages compensation paid or payable to widow under Dust Diseases Act - primary judge erred in assessment of s15B damages - matter remitted to Tribunal for determination of damages under s15B.

[Dionisatos \(I C\)](#)

[From Benchmark Monday, 21 September 2015]

Capogreco v Rogerson [2015] NSWSC 1371

Supreme Court of New South Wales

Bergin CJ in Eq

Contract - misleading and deceptive conduct - plaintiffs purchased interest in defendant's horse - defendant entered horse in auction - defendant sold horse to second defendant by private sale - plaintiffs claimed they weren't advised of offer to purchase horse or informed or consulted concerning sale - plaintiffs claimed they did not authorise or consent to purported sale or transfer of their ownership interests - plaintiffs claimed they wished to purchase horse at auction - plaintiffs refused to accept money from sale of horse and claimed no ratification of sale of horse - held: plaintiffs' claims against defendant for misleading or deceptive conduct dismissed - defendant did not have authority to sell plaintiffs' shares in horse - plaintiffs entitled to declarations they held respective percentage interests in horse - plaintiffs entitled to order for account against second defendant - parties should proceed to mediation.

[Capogreco](#) (I B)

[From Benchmark Friday, 18 September 2015]

National Australia Bank Ltd v Swed (No 2) [2015] NSWSC 1322

Supreme Court of New South Wales

Davies J

Banker and customer - wife stole money from husband's account to support gambling addiction - husband defaulted on mortgage - bank sought possession of property - Electronic Funds Transfer Code of Conduct issued by ASIC - Bank alleged husband had failed to comply with the Telephone Banking Terms and Conditions that formed part of agreement between husband and bank - held: Bank had failed to discharge burden of proving the husband had failed to keep his keycard in a safe place or to provide reasonable protection from theft - husband had not known of the wife's transactions and did not contribute to those transactions - husband had not voluntarily disclosed PIN to wife - husband had not acted with extreme carelessness within the meaning of the Code of Conduct - judgement for husband.

[NAB](#) (I B)

[From Benchmark Tuesday, 22 September 2015]

Application by Elizabeth Marie Robinson [2015] NSWSC 1387

Supreme Court of New South Wales

Rein J

Succession - construction of will - deceased left gift to her son, unless he *[died] before attaining a vested interest*, in which case the gift was to go the son's daughter - son died before gift vested in possession - question whether son died before attaining a vested interest - question of construction whether *vested* meant vested in possession or vested in interest - held: wills should be construed according to the plain meaning of their words, but the will should be read as a whole, in order to give effect to the testator's intention - *Fell v Fell* (1922) 31 CLR 268 - undesirable to focus on the meaning particular words have been given in other wills - however,

a rule of law may give a certain meaning to particular technical expressions - testator's intention here was to give granddaughter a bequest that was intended to go to her son, if by the time the estate is ready to be distributed, the son had died - practical consequence of this interpretation was that the gift could go directly and immediately to the granddaughter without having to await the administration of her father's estate - no scope for operation of a presumption that *vested* is a technical expression that means vested in interest by a rule of law.
[Elizabeth](#) (B)

[From Benchmark Wednesday, 23 September 2015]

In the matter of Italian Forum Limited (subject to a deed of company arrangement) [2015] NSWSC 1386

Supreme Court of New South Wales

Rein J

Sale of land - administrator appointed to company - company owned Italian Forum property in Leichhardt - company owed debts to Leichhardt Council for unpaid rates - Council holds mortgage over company's property - company contracted to sell land to purchaser with consent of Council - administrator wanted to proceed with sale, and considered that certain payments should be made by the company under administration as vendor under the contract of sale – administrator sought directions from the Court regarding proposed course of action and construction of the contract of sale - *s447D Corporations Act 2001 (Cth)* - proceedings expanded to include declarations and order for payment - held: sale was in the interests of company's creditors - the terms of the contract of sale required, as between the vendor and purchaser, that the vendor pay Building Management Committee levies for the relevant periods – administrator was justified in pursuing his proposed course of action.

[Italian Forum](#) (C)

[From Benchmark Wednesday, 23 September 2015]

Frankel v Paterson [2015] NSWSC 1307

Supreme Court of New South Wales

Young AJA

Sale of land – purchasers of strata property were impressed by garden that was part of common property – after exchange, garden was fenced off by another unitholder to be a dog compound - purchaser did not complete - vendors issued notice to complete - purchaser sought declaration that notice to complete was invalid and that the purchaser did not have to complete, and for return of deposit - vendors sought specific performance - held: the fact that the vendors sought specific performance rendered anything to do with the notice to complete otiose - rule in *Flight v Booth* (1834) 1 Bing (NC) 370; (1834) 131 ER 1160 - test is , objectively, whether a reasonable person in the position of the purchasers would take the view that the purchasers were not getting substantially the property they contracted for - the mere fact that a unitholder has unilaterally appropriated part of the common property is not of major concern as the appropriation can be reversed - this may require action either before the Strata Titles Commissioner or the Court - in the circumstances, there was no substantial misdescription of the property the purchasers were buying – vendors claimed dismissed and order for specific

performance to be made.

[Frankel](#) (B C)

[From Benchmark Wednesday, 23 September 2015]

Erlich v Leifer [2015] VSC 499

Supreme Court of Victoria

Rush J

Negligence - psychiatric injury - plaintiff claimed she was sexually abused by first defendant headmistress of second defendant school and consequently suffered severe psychiatric injury - plaintiff claimed damages for injury and loss and also aggravated and exemplary damages against first defendant and school - judgment entered against first defendant prior to trial - school denied it breached its duty of care to plaintiff - despite admission in defence school denied at trial that first defendant was principal - school denied it employed principal and denied it was vicariously liable - school alleged first defendant employed by unincorporated association concerned with religious instruction at school - plaintiff pleaded in alternative that first defendant was mind and will of school by virtue of position and responsibilities within school, and that school was directly liable for her actions - recruitment and employment of first defendant - direct liability - non-delegable duty of care/vicarious liability - causation and damages - held: first defendant's misconduct was misconduct of school - school directly liable for damages arising from injuries caused by first defendant's serious criminal conduct - school vicariously liable for sexual abuse committed by first defendant on plaintiff - plaintiff failed to prove school breached duty of care to plaintiff to take reasonable care - damages awarded, including exemplary damages.

[Erlich](#) (I)

[From Benchmark Friday, 18 September 2015]

Willner v Dept of Economic Development, Jobs, Transport and Resources[2015] VSC 504

Ierodionou AsJ

Freedom of information - the applicant is a photographer and artist whose artwork explores the boundaries of public space - he requested from the Department 24 hours of CCTV footage that had been recorded in a train carriage - he intended to use that footage in an artwork in a public exhibition - *Freedom of Information Act 1982* (Vic) – deemed refusal - applicant applied to the Victorian Civil and Administrative Tribunal - Tribunal affirmed refusal on basis that release of the footage would involve the *unreasonable disclosure of information relating to the personal affairs of any person* - applicant sought leave to appeal to Supreme Court on questions of law - held: there was a real argument there had been an error of law - that is, it was arguable that the Tribunal's factual finding that pixelating the footage would be prohibitively expensive was not open on the evidence - leave to appeal granted.

[Willner](#) (I G)

[From Benchmark Tuesday, 22 September 2015]

Agripower Australia Ltd v Queensland Engineering & Electrical Pty Ltd [2015] QSC 268

Supreme Court of Queensland

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Douglas J

Security of payments - applicant sought declaration adjudication decision made under *Building and Construction Industry Payments Act 2004* (Qld void because contract between applicant and first respondent illegal and unenforceable - applicant submitted first respondent contravened s56 *Electrical Safety Act 2002* (Qld) by advertising it performed electrical work when it did not hold electrical contractor's licence - applicant also claimed first respondent and its agents were not practising professional engineers but carrying out professional engineering services contrary to s115(1) *Professional Engineers Act 2002* (Qld) - first respondent accepted that if it were carrying out professional engineering services in breach Professional Engineers Act then its contract illegal and unenforceable - held: first respondent's contract with applicant was illegal for breach of ss56 & 115 - first respondent not entitled to progress payments - application successful - adjudication decision void.

[Agripower](#) (C)

[From Benchmark Thursday, 17 September 2015]

Larussa Pastorial Holdings Pty Ltd v Carr [2015] WASCA 194

Supreme Court of Western Australia

Murphy JA

Trusts and succession - administratrix of deceased estate considered the Larussa Pastoral Trust held a beneficiary loan account in the deceased's name - requested certain documents from the trustee, but was unsuccessful - applied to the Supreme Court - Master ordered the trustee to produce the documents - trustee sought stay of Master's orders pending appeal - held: special circumstances must be shown before the Master's orders would be stayed - Master had found the administratrix had sought the documents for a proper purpose - trustee's evidence to the contrary was vague and lacking in detail - appeal from the Master's orders would not be rendered entirely nugatory if a stay were not granted - trustee had not filed an appellants' case and the Court therefore could not assess the strength of its case on appeal - stay refused.

[Larussa](#) (B)

[From Benchmark Tuesday, 22 September 2015]

Miles v Campus Living Villages Murdock Pty Ltd [2015] WASC 350

Supreme Court of Western Australia

Pritchard J

Residential tenancy - student accommodation provider obtained orders against student tenant in Magistrates Court - tenant applied to Supreme Court for injunction against eviction - held: tenant originally sought injunction as a cause of action in and of itself, with no other cause of action or proceedings in the Court - Court's injunctive power is dependent on a pre-existing cause of action arising from an actual or threatened invasion of a legal or equitable right - during the hearing, tenant foreshadowed Supreme Court proceedings to review the Magistrates Court decision - alleged denial of natural justice due to non-service of notice of those proceedings - s36 *Magistrates Court Act 2004* (WA) - foreshadowed proceedings gave the Court jurisdiction to make the injunction sought - there was a serious case to be tried in the foreshadowed proceedings - balance of convenience favoured granting the injunction - injunction granted on

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condition the tenant file the foreshadowed proceedings and give the usual undertaking as to damages.

[Miles](#) (I B)

[From Benchmark Tuesday, 22 September 2015]

Quarmby v Oakley [2015] TASFC 11

Full Court of the Supreme Court of Tasmania

Porter, Estcourt & Pearce JJ

Pleadings - appellant claimed damages for unnecessary and vexatious lodgement of caveats - caveats lodged in support of judgment - appellant also sought declarations in relation to costs and interest - appellant contended primary judge erred in striking out statement of claim in action and dismissing action - s165 *Supreme Court Civil Procedure Act 1932* (Tas) - held: caveats not lodged in support of malicious claim - caveats consequent on respondents obtaining judgment against appellant - no possibility caveats lodged in support of unmeritorious or malicious claim - appellant had no actionable claim by writ - no statement of claim could overcome difficulty - statement of claim in as far as it was claim for damages for unlawful maintenance of caveats should be struck out - no prospect of claim succeeding - interest payable on amount stated in certificate of taxation from time of trial - appeal dismissed.

[Quarmby](#) (B)

[From Benchmark Thursday, 17 September 2015]

Adhesive Pro Pty Ltd v Blackrock Supplies Pty Ltd [2015] ACTSC 288

Supreme Court of the Australian Capital Territory

Mossop AsJ

Corporations law - statutory demand served on plaintiff - time limit to apply to set aside statutory demand is 21 days - s459G *Corporations Act 2001* (Cth) - 20 days after service, a solicitor for the plaintiff attended the Supreme Court Registry and filed an application to set aside the statutory demand - despite a request by the solicitor, the Registry would not provide sealed copies of the application straight away, but said that sealed copies would be available in a few days - the solicitor then served an unsealed copy of the application on the defendant - the solicitor served the sealed application several days later, out of time - held: there is no capacity to extend the time to commence proceedings to set aside a statutory demand - *David Grant & Co Pty Ltd v Westpac Banking Corporation* [1995] HCA 43; 184 CLR 265 - Registry processes did not reasonably accommodate the need for the Court to promptly record the filing of documents and provide sealed service copies to the plaintiff so they could be served within time - nevertheless, plaintiff had not served a copy of the application within the meaning of s 459G(3) - Court did not have jurisdiction - proceedings dismissed.

[Adhesive Pro](#) (I B C)

[From Benchmark Wednesday, 23 September 2015]

CRIMINAL

Executive Summary

Gal v R (NSWCCA) - criminal law - break and enter - error in sentencing process established but same or greater sentence would be imposed on re-exercise of discretion - leave to appeal granted - appeal dismissed

R v Martinez (QCA) - criminal law - offence against s328A(1) *Criminal Code* (Qld) - irregularity causing miscarriage of justice - conviction set aside - retrial ordered

Summaries With Link

Gal v R [2015] NSWCCA 242

Court of Criminal Appeal of New South Wales
Bathurst CJ; Price & Beech Jones JJ

Criminal law - applicant sentenced on two charges - first was that applicant did break, enter and steal from home contrary to s112(1) *Crimes Act 1900* (NSW) - second was that on same day applicant did break, enter and steal from residential premises in circumstances of aggravation contrary to s112(2) - applicant sentenced to total term of imprisonment of five years and six months and a non-parole period of three years - applicant sought leave to appeal from sentences on basis sentencing judge failed to address objective seriousness of offences or failed to give reasons stating what assessment was - ss9 & 21A(2)(j) *Crimes (Sentencing Procedure) Act 1999* (NSW) - s6(3) *Criminal Appeal Act 1912* (NSW) - held: error in sentencing process established - however on fresh exercise of the power to impose sentence Court considered that 'same sentence or a greater sentence is the appropriate - leave to appeal granted - appeal dismissed.

[Gal](#)

R v Martinez [2015] QCA 169

Court of Appeal of Queensland
Gotterson & Morrison JJA; McMeekin J

Criminal law - appellant convicted of offence against s328A(1) *Criminal Code* (Qld) in circumstances to which s328A(4) applied in that he dangerously operated vehicle on highway and caused death of another person - appellant sentenced to two years' imprisonment - appellant disqualified from holding or obtaining a driver's licence for three years from date of sentence - appellant appealed against conviction on ground a miscarriage of justice was occasioned by material irregularity in appellant's trial - common ground that irregularity had occurred in that trial judge had arranged for copy of transcript of trial to be given to jury and contrary to trial judge's expectation, the transcript had contained at least eight pages of transcript in which statements made by trial judge or counsel in jury's absence were transcribed - held: Court could not be satisfied that had irregularity not occurred, jury would have convicted

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appellant - irregularity caused a miscarriage of justice - s668E(1) of the Criminal Code required that appeal be allowed and conviction set aside - retrial ordered.

[Martinez](#)



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Voices of the Air

By Katherine Mansfield

But then there comes that moment rare
When, for no cause that I can find,
The little voices of the air
Sound above all the sea and wind.

The sea and wind do then obey
And sighing, sighing double notes
Of double basses, content to play
A droning chord for the little throats—

The little throats that sing and rise
Up into the light with lovely ease
And a kind of magical, sweet surprise
To hear and know themselves for these—

For these little voices: the bee, the fly,
The leaf that taps, the pod that breaks,
The breeze on the grass-tops bending by,
The shrill quick sound that the insect makes.

[KatherineMansfield](#)

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