

Friday, 26 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)

**Gnych v Polish Club Ltd** (HCA) - lease - breach of s92(1)(d) *Liquor Act 2007* (NSW) by failure to obtain Authority's approval for lease did not automatically render lease void and unenforceable (I B)

**Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd [2015] HCA 21** (HCA) - discovery - contempt - appellant corporation amenable to order to make discovery under r29.07(2) *Supreme Court (General Civil Procedure) Rules 2005* (Vic) - appeal dismissed (I B C)

**Minister for Immigration and Border Protection v WZAPN; WZARV v Minister for Immigration and Border Protection** (HCA) - migration - likelihood of period of temporary detention of person for reason mentioned in Refugees Convention was not of itself and without more a 'threat to liberty' - Minister's appeal allowed - no want of procedural fairness - claimant's appeal dismissed (G)

**Papantoniou v Brown** (NSWCA) - contract - arrangement for purchase of share in property - finding of unjust contract outside pleadings - denial of procedural fairness - appeal allowed (I B)

**Endeavour Energy v Precision Helicopters Pty Ltd** (NSWCA) - negligence - contract - multiple claims arising from helicopter crash - appeal allowed in part (I)

**Agripower Barraba Pty Ltd v Blomfield** (NSWCA) - real property - fixtures - appellant entitled to certain disputed items which were not fixtures - appeal allowed in part (I B C)

**Fairfield City Council v Arduca** (NSWCA) - workers compensation - worker suffered hernias in work injury - employer liable - leave to appeal refused (I G)

**Stephenson v Parkes Shire Council; Stephenson v Parkes Shire Council; Jay Stephenson v Parkes Shire Council; South West Helicopters Pty Ltd v Essential Energy (formerly Country Energy); Parkes Shire Council v South West Helicopters Pty Ltd (No 2)** (NSWSC) - damages - nervous shock - compensation to relatives - joint tortfeasors - assessment of damages - apportionment (I)

**NSW Trustee and Guardian v Lagana** (NSWSC) - possession - deed of family arrangement - trustee entitled to possession of property (B)

**Biddle v State of Victoria** (VSC) - assault - false imprisonment - police acted lawfully in arresting and detaining plaintiff - proceeding dismissed (I)

**CGU Insurance Ltd v Blakeley** (VSCA) - joinder - corporations - joinder of defendants' insurer by plaintiffs - insurer's appeal dismissed (I B)

**Packer v Tall Ship Sailing Cruises Australia Pty Ltd** (QCA) - negligence - assault on ship on return from Christmas party - trial judge correct to find operator of cruise not liable - appeal dismissed (I)

**Spencer v Burton** (QCA) - Wills and estates - succession - intestacy - erroneous revocation of Letters of Administration on Intestacy - appeal allowed (B)

**Volanne Pty Ltd v International Consulting and Business Management Pty Ltd** (ACTCA) - stay - contract - stay of enforcement of Master's decision granted pending appeal (I B)

**Flegg v Hallett** (QSC) - defamation - action arising from media conference announcement, conference and radio interview - defamation established - damages assessed (I)

## Summaries With Link (Five Minute Read)

### **Gnych v Polish Club Ltd [2015] HCA 23**

High Court of Australia

French CJ; Kiefel, Gageler, Keane & Nettle JJ

Lease - respondent Club leased part of licensed premises to appellants for running restaurant - Club breached s92(1) *Liquor Act 2007* (NSW) by not obtaining Authority's approval for lease - relations between parties deteriorated - Club terminated relationship and requested that appellants vacate premises - appellants sought declaration they had leasehold interest in

# Benchmark

restaurant area for five-year period pursuant to ss8 & 16 *Retail Leases Act 1994* (NSW) and injunction restraining Club from interfering with their possession - Supreme Court of New South Wales granted declaration and injunction - Court of Appeal of New South Wales allowed Club's appeal, finding that lease granted in breach of s92(1) Liquor Act conflicted with purpose and policy of Liquor Act - held: Court of Appeal erred in concluding policy or purposes of Liquor Act could not be served by any sanction short of holding lease void - on proper construction Club's breach of s92(1) did not automatically render lease void and unenforceable - appeal allowed.

[Gnych](#) (I B)

[From Benchmark Thursday, 18 June 2015]

## **Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd [2015] HCA 21**

High Court of Australia

French CJ; Kiefel, Bell, Gageler, Keane & Nettle JJ

Discovery - contempt - Boral sought to punish appellant for contempt of Court by establishing blockade of construction site in disobedience of Court orders - Boral sought discovery of documents concerning whether appellant authorised employee to establish blockade - whether appellant corporation amenable to order under r29.07 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) to make discovery of particular documents in proceedings - appellant argued terms of r29.07 not sufficiently clear to oblige it to disadvantage itself as defendant in proceedings which were either criminal or quasi-criminal - held: appellant's argument failed because contempt proceeding against appellant was a civil proceeding to which r29.07 applied according to its tenor - appeal dismissed.

[Construction](#) (I B C)

[From Benchmark Thursday, 18 June 2015]

## **Minister for Immigration and Border Protection v WZAPN; WZARV v Minister for Immigration and Border Protection [2015] HCA 22**

High Court of Australia

French CJ; Kiefel, Bell, Gageler & Keane JJ

Migration - refugee status - threat to liberty - in each of two appeals claimant for protection visa contended he was refugee from persecution in country of nationality or former habitual residence - whether for purposes of s91R *Migration Act 1958* (Cth) likelihood of temporary detention of person for reason mentioned in Refugees Convention was of itself and without more a threat to liberty under s91R(2) - claimants argued likelihood of any detention was such a threat and therefore instance of serious harm for purpose s91R(1)(b) irrespective of frequency, length or conditions of detention and its consequences for detainee - held: question whether risk of loss of liberty constituted "serious harm" under s91R required making of qualitative judgment including evaluation of nature and gravity of loss of liberty - question whether likelihood of detention in any case rose to level of serious harm instanced by s91R(2) invited consideration of circumstances and consequences of detention - likelihood of period of temporary detention of person for reason in mentioned in Refugees Convention was not of itself and without more a threat to liberty - appeal allowed - Independent Merits Reviewer's decision to reject claimant's

# Benchmark

claim to refugee status not void for want of procedural fairness Minister's appeal allowed - claimant's appeal dismissed.

[Minister](#) (G)

[From Benchmark Thursday, 18 June 2015]

## **Papantoniou v Brown [2015] NSWCA 168**

Court of Appeal of New South Wales

Beazley P; Macfarlan JA & Sackville AJA

Contract - unjust contracts - procedural fairness - solicitor entered contractual arrangement with two brothers, one of which later died, to purchase sisters' share of co-owned property - brothers agreed solicitor could borrow funds for purchase and provide mortgage of property as security - brothers agreed to provide guarantees to lender - solicitor made purchase with borrowed funds secured over property - brothers provided guarantees - solicitor defaulted - lender took possession - one brother incurred expenses in unsuccessful attempt to resist lender's claim - primary Judge found original contractual arrangement unjust under *Contracts Review Act 1980* and declared it void to extent it required solicitor's liability to be borne by respondents and ordered solicitor to pay compensation to respondents - held: finding that contractual arrangement unjust was outside cross-claims pleaded by respondents - conditions in *Dare v Pulham* for conduct of case outside pleadings not satisfied - solicitor denied procedural fairness - respondents not entitled to claim expenses against solicitor of unsuccessfully resisting lender's claim for possession - appeal allowed.

[Papantoniou](#) (I B)

[From Benchmark Wednesday, 24 June 2015]

## **Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169**

Court of Appeal of New South Wales

Basten JA, Macfarlan JA & Sackville AJA

Negligence - contract - apportionment - helicopter owned/operated by company (Precision) crashed while inspecting powerlines pursuant to contract with another company (Endeavour) when skid of helicopter caught wire owned by Telstra - observer in helicopter and employed by Endeavour injured and helicopter damaged - observer was not wearing helmet - observer and family sought damages for personal injury and nervous shock and other parties sought orders for contribution or indemnity - trial judge dismissed claims against Telstra - trial judge found Precision and Endeavour liable to observer and apportioned liability at 85% and 15% - trial judge found Endeavour not entitled to rely on contractual indemnity against Precision - trial judge also found carriage not covered by *Civil Aviation (Carriers' Liability) Act 1967* because observer not a "passenger" - Endeavour and Precision appealed - Pt IA Div 2, ss5B, 5C; 5D, 5E & 35 *Civil Liability Act 2002* - held: primary judge erred in finding Telstra not liable for breach of duty of care to owner and occupants of helicopter - observer was a "passenger" for purposes of Carrier's Liability Act - Endeavour breached contractual and general law duties to observer and to Precision - even if pilot should have conducted high level survey of area it would not have revealed presence of wire - Precision not liable for breach of duty which would not have revealed materialised risk - appeal allowed in part.

[Endeavour](#) (I)

[From Benchmark Wednesday, 24 June 2015]

**Agripower Barraba Pty Ltd v Blomfield [2015] NSWCA 30**

Court of Appeal of New South Wales

Bathurst CJ, Beazley P & Sackville AJA

Real property - fixtures - Agripower sought declaration it was true owner of plant and equipment on land and orders to permit removal of items - occupiers of property agreed that if disputed items were not fixtures they would permit their removal from property - Agripower challenged primary judge's holdings that disputed items were fixtures and that it had not obtained legal title to disputed items but only rights of a secured creditor - Agripower sought to adduce further evidence pursuant to s75A(7) *Supreme Court Act 1970* - held: leave to adduce further evidence refused - Court found that certain items should not be regarded as fixtures - no error in primary judge's finding that other disputed items were fixtures - Agripower's appeal allowed in part - declaration made that Agripower owned seven disputed items and was entitled to immediate possession - proceedings remitted to primary judge to determine outstanding issues.

[Agripower](#) (I B C)

[From Benchmark Friday, 19 June 2015]

**Fairfield City Council v Arduca [2015] NSWCA 166**

Court of Appeal of New South Wales

McCull & Meagher JJA; Sackville AJA

Workers compensation - worker suffered hernias in work injury - worker returned to work and performed 'light duties' as proposed by injury management plan - worker resigned "due to ill health" - employer disputed liability for injury on basis worker unreasonably elected to retire rather than comply with injury management plan as required by s47 *Workplace Injury Management and Workers Compensation Act 1998* - Workers Compensation Commission found in worker's favour - decisions were affirmed by Presidential member - employer sought leave to appeal - held: no denial of procedural fairness by Arbitrator in decision that s57 did not disentitle worker to weekly compensation payments - letter from employer's solicitors to worker's solicitors did not comply with s74 as it did not raise worker's alleged failure to comply with s254 in respect of provision of notice of injury - no constructive failure to address employer's argument as to letter's efficacy and entitlement to rely on non-compliance with s254 - leave to appeal refused.

[Fairfield](#) (I G)

[From Benchmark Monday, 22 June 2015]

**Stephenson v Parkes Shire Council; Stephenson v Parkes Shire Council; Jay Stephenson v Parkes Shire Council; South West Helicopters Pty Ltd v Essential Energy (formerly Country Energy); Parkes Shire Council v South West Helicopters Pty Ltd (No 2) [2015] NSWSC 719**

Supreme Court of New South Wales

Bellew J

# Benchmark

Damages - nervous shock - compensation to relatives - joint tortfeasors - apportionment - actions arising out of helicopter accident - Court delivered judgment in proceedings in relation to issues of liability - determination of damages and apportionment - claims for nervous shock - claim under *Compensation to Relatives Act 1897* (NSW) - *Civil Aviation (Carriers' Liability) Act 1959* (Cth) - *Civil Liability Act 2002* (NSW) - damages sought by operator/bailee of helicopter - breach of duty by three parties - comparison of culpability and causal potency for purposes of apportionment - statutory indemnity - limitations - employer's claim against other tortfeasor to recover compensation made in favour of deceased worker - parties to bring in short minutes reflecting conclusions on liability, damages and apportionment.

[Stephenson](#) (I)

[From Benchmark Tuesday, 23 June 2015]

## **NSW Trustee and Guardian v Lagana [2015] NSWSC 779**

Supreme Court of New South Wales

Garling J

Possession - trustee was registered proprietor of property - trustee claimed it was entitled to vacant possession as consequence of Court's orders pursuant to *Criminal Assets Recovery Act 1990* - defendants claimed they were entitled to remain in possession because of arrangement made by their late mother with prior registered proprietor of property, who was late mother's brother - deed of family arrangement - circumstances of resolution of criminal assets recovery proceedings - held: Court not satisfied there was any arrangement between prior registered proprietor and defendants' late mother which was sufficient to give any right to defendants to occupy property - trustee entitled to possession of property - judgment for trustee.

[NSW](#) (B)

[From Benchmark Tuesday, 23 June 2015]

## **Biddle v State of Victoria [2015] VSC 275**

Supreme Court of Victoria

Kaye JA

Assault - false imprisonment - plaintiff sued police defendants and State claiming damages arising out of arrest at caravan park for assault and false imprisonment - arrest effected by police without warrant - police purported to arrest plaintiff under s124 *Family Violence Protection Act 2008* which provided that police officer may arrest and detain person without warrant if police officer believed on reasonable grounds that person had committed an offence by contravening family violence order - held: Court satisfied police acted lawfully in arresting and detaining plaintiff - claim for damages for assault and false imprisonment failed - proceeding dismissed.

[Biddle](#) (I)

[From Benchmark Friday, 19 June 2015]

## **CGU Insurance Ltd v Blakeley [2015] VSCA 153**

Court of Appeal of Victoria

Ashley, Beach & McLeish JJA

Joinder - corporations - claim under s588M *Corporations Act 2001* (Cth) in which plaintiffs were liquidators and company in liquidation who alleged company's directors breached s588G by failing to prevent company from incurring debts when it was insolvent - defendants' insurer sought leave to appeal against order joining it as a defendant - jurisdiction - state of authorities regarding appropriateness of joinder of an insurer at instance of party other than insured - held: possibility of separate proceedings between current parties and later proceedings between relevant liquidator or trustee in bankruptcy and insurer could not be countenanced - trial judge's analysis correct - orders should not be disturbed - question whether there were ultimately grounds for declaration against insurer was matter for trial - leave to appeal granted on basis it had prospect of success - appeal dismissed

[CGU](#) (I B)

[From Benchmark Monday, 22 June 2015]

## **Packer v Tall Ship Sailing Cruises Australia Pty Ltd [2015] QCA 108**

Court of Appeal of Queensland

Gotterson JA; Boddice & Flanagan JJ

Negligence - employer held annual Christmas party for employees and families on a day cruise - shortly after boarding ship for return voyage, appellant employee injured when he was assaulted by another passenger - employee sued operator of ship/licensee of licensed premises and employer for breach of duty of care to act with reasonable skill and care to protect him against risk of assault - trial judge dismissed claims - appellant appealed against dismissal of claim against operator of ship - held: trial judge made no material factual error or error of law - trial judge correctly concluded that appellant's claim against operator should be dismissed - appeal dismissed.

[Packer](#) (I)

[From Benchmark Tuesday, 23 June 2015]

## **Spencer v Burton [2015] QCA 104**

Court of Appeal of Queensland

Holmes & Gotterson JJA; A Lyons J

Wills and estates - succession - deceased died of cancer - appellant obtained Letters of Administration on Intestacy of deceased's estate on basis he was deceased's de facto partner - respondent was deceased's mother - respondent sought declaration appellant was not spouse or de facto partner and sought that Letters of Administration on Intestacy granted to him be revoked - respondent sought replacement grant of Letters of Administration on Intestacy be granted to her - primary judge made declarations and orders sought - held: appellant established that primary judge failed to come to terms with evidence and that there was an error in application of s32DA *Acts Interpretation Act* - appeal allowed - new trial with expedited hearing.

[Spencer](#) (B)

[From Benchmark Thursday, 18 June 2015]

## **Volanne Pty Ltd v International Consulting and Business Management Pty Ltd [2015]**

# Benchmark

## ACTCA 25

Court of Appeal of the Australian Capital Territory

Burns J

Contract - loan - guarantee - Master found in favour of respondents in proceedings - applicants sought stay of enforcement of Master's decision until further order of Court - prospects of success - respondents' entitlement to fruits of judgment - held: not suggested grounds of appeal not arguable - appeal not doomed to fail - only about 8 weeks until appeal heard - little prospect of respondents being unable to recover against Master's judgment if appeal unsuccessful - appellants had offered to pay further amount into interest bearing account to await outcome of appeal - stay granted on condition of payment of sum into account as agreed by parties.

[Volanne](#) (I B)

[From Benchmark Thursday, 18 June 2015]

## Flegg v Hallett [2015] QSC 167

Supreme Court of Queensland

P Lyons J

Defamation - defendant announced to journalists he would be holding media conference - plaintiff held conference and participated in a radio interview - plaintiff alleged defendant defamed him on each of the three occasions - defendant alleged that he had defence of privilege at common law as each publication related to government or political matters in which community had an interest - defended also contended the making of each publication was reasonable - defendant also relied on statutory defence in s30 *Defamation Act 2005* - reasonableness of defendant's conduct - held: Court concluded that, by reference to imputations found, each of the relevant publications contained defamatory matter - Court not satisfied defendant's conduct in making publications was reasonable - Court concluded defendant actuated by malice in making publications - defendant defamed plaintiff on each of the three occasions - damages assessed.

[Flegg](#) (I)

[From Benchmark Monday, 22 June 2015]

## CRIMINAL

### Executive Summary

**Colville v R** (NSWCCA) - criminal law - dangerous driving occasioning death and occasioning grievous bodily harm - appeal against sentence dismissed

### Summaries With Link

**Colville v R [2015] NSWCCA 149**

Court of Criminal Appeal of New South Wales

Ward JA; Johnson & Garling JJ

Criminal law - appellant pleaded guilty to one count of dangerous driving occasioning death contrary to s52A(1) *Crimes Act 1900* (NSW) and one count of dangerous driving occasioning grievous bodily harm contrary to s52A(3) - appellant sentenced to 3 years and 5 months imprisonment with non-parole period of 2 years and 3 months - appellant sought to appeal - appellant contended primary judge erred in finding offender was sleep deprived with level of fatigue exacerbated by secondary effects of at least his methylamphetamine usage - appellant also contended primary judge erred in rejecting material tendered in relation to deprived childhood - held: no error in assessment of moral culpability - open to primary judge to infer that sleep deprivation exacerbated by secondary effects of illicit substances caused appellant's failure to keep car on correct side of road - no error in relation to weight given to unsworn and untested account of childhood - no error in sentencing established - appeal dismissed.

[Colville](#)



# Benchmark

## **Fireflies in the Garden**

By Robert Frost

Here come real stars to fill the upper skies,  
And here on earth come emulating flies,  
That though they never equal stars in size,  
(And they were never really stars at heart)  
Achieve at times a very star-like start.  
Only, of course, they can't sustain the part.

[Robert Frost](#)

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