

Friday 31 October 2014

Weekly Civil Law Review

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Insurance, Banking, Construction & Government

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Executive Summary (1 minute read)

Munday v Commonwealth of Australia (No 2) (FCA) - human rights - early access to superannuation fund refused - no unlawful discrimination (B G)

Queensland Mining Corporation Ltd v Renshaw (No 3) (FCA) - costs - successful plaintiffs' breach contributed to need for proceedings - plaintiffs to pay 20% of own costs (B C)

Szajna v Australian Postal Corporation (FCA) - workers compensation - AAT misconstrued *injury* - error of law - appeal allowed (I G)

Firebird Global Master Fund II Ltd v Republic of Nauru (NSWCA) - registration of foreign judgment against Nauru invalid (I B)

Dansar Pty Ltd v Byron Shire Council (NSWCA) - negligence - pure economic loss - delay in obtaining development approval - no duty of care owed by Council (I C)

Ahmet v Chief Commissioner of Police (VSCA) - subpoena - public interest immunity - failure to weigh competing considerations - appeal allowed (I)

Ristic v Maroti (No 2) (VSC) - funds in court - proceeds of sale of property - failure to prove contribution to relationship - payment out less admitted sum owing (B)

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Dale v Clayton Utz (a firm) (No 2) (VSC) - partnership - privileges against self-incrimination - rule of practice in *Protean Holdings* - proceedings split (I B)

Du Pradal v Petchell (QSC) - negligence - snorkeller run over by boat - boat driver liable (I)

Elton v Public Trustee (SASC) - probate - Wills - lost document did not extinguish prior Will (B)

Goldedge Holdings Pty Ltd v Liquor and Gambling Commissioner (SASC) - leases - liquor and gaming - no error in Commissioner's decision to transfer gaming machine licence to lessor and accepting lessor's offer to sell entitlements (I B)

Summaries with links (5 minute read)

Munday v Commonwealth of Australia (No 2) [2014] FCA 1123

Federal Court of Australia

Katzmann J

Superannuation - human rights - discrimination - husband and wife claimed Commonwealth discriminated against wife contrary to *Disability Discrimination Act 1992* (Cth) concerning conduct of program under which superannuant may acquire early access to superannuation funds on compassionate grounds - wife sought early release to pay for IVF treatment on basis it was necessary to alleviate depression - first application rejected because decision-maker not satisfied IVF necessary to alleviate depression or that she lacked financial capacity to meet expense arising from proposed treatment by other means - second application rejected because decision-maker not satisfied IVF necessary to alleviate depression and because superannuation funds would be used for purpose not permitted under Australian law - requirement of lawful purpose not specified in *Superannuation Industry (Supervision) Act 1993* (Cth) or *Superannuation Industry (Supervision) Regulations 1994* (Cth) - whether imposition of requirement involved unlawful discrimination on basis of wife's infertility - whether failure to obtain independent legal advice before imposing requirement involved a failure to make a *reasonable adjustment* - ss5 & 6 *Disability Discrimination Act 1992* (Cth) - held: applicants unable to prove any unlawful discrimination - application dismissed.

Munday (B G)

[From Benchmark 24 October 2014]

Queensland Mining Corporation Ltd v Renshaw (No 3) [2014] FCA 1126

Federal Court of Australia

Perry J

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Costs - Court held plaintiff (QMCL) entitled under s200J *Corporations Act 2001* (Cth) (Act) to recover termination payments from Renshaw defendants on ground they were made in contravention of s200B and were held on trust by recipients for QMCL - Renshaw defendants contended each party should bear own costs on application for recovery of termination benefits - held: QMCL successful on all grounds in litigation - Renshaw defendant's conduct in failing to repay money necessitated bringing of proceedings - QMCL's conduct in freely entering into settlement deed and paying over money not too remote to take into account in determining appropriate award of costs - QMCL had acted in breach of s200B - QMCL's part in creating situation leading to need for recovery proceedings should fairly find reflection in costs order - appropriate order was that Renshaw defendants pay 80% of QMCL's costs.

Queensland Mining Corporation Ltd (B C)

[From Benchmark 24 October 2014]

Szajna v Australian Postal Corporation [2014] FCA 1136

Federal Court of Australia

Rangiah J

Workers compensation - applicant's husband employed at respondent's facility as mail officer - husband died at place of work - death caused by ventricular fibrillation brought on by underlying coronary artery disease - Administrative Appeals Tribunal affirmed respondent's determination that applicant was not entitled to compensation under s14 *Safety, Rehabilitation and Compensation Act 1988* (Cth) for husband's death - applicant submitted AAT erred by misconstruing *injury* in s5A(1) - whether AAT erred in finding an inevitable consequence of an underlying disease was not an injury - held: AAT erred in law by concluding that defined term *injury* incorporated a legal principle that did not exist - AAT also erred in misconstruing *injury* in phrase *injury (other than a disease)* in s5A(1)(b) - appeal allowed.

Szajna (I G)

[From Benchmark 28 October 2014]

Firebird Global Master Fund II Ltd v Republic of Nauru [2014] NSWCA 360

Court of Appeal of New South Wales

Bathurst CJ; Beazley P & Basten JA

Judgments and orders - sovereign immunity - Firebird obtained judgment against Nauru in Japan - Firebird sought to register Japanese judgment in NSW Supreme Court pursuant to *Foreign Judgments Act 1991* (Cth) - application was by summons - summons not served on Nauru - Japanese judgment registered - Firebird obtained garnishee order - primary judge held judgment should not have been registered and garnishee order should be set aside - held: service requirements set out in Foreign Judgments Act and *Foreign States Immunities Act 1985* (Cth) could be read harmoniously so that the former did not impliedly repeal requirements in the latter - failure to adhere to service requirements set out in Immunities Act meant registration of Japanese judgment should be set aside - proceeding in s9 of the Immunities Act covered application to

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register a foreign judgment and therefore immunity operated - Nauru did not waive its immunity - exception to immunity did not apply because proceedings concerned application to register foreign judgment not a commercial transaction - appeal dismissed.

Firebird Global Master Fund II Ltd (I B)

[From Benchmark 27 October 2014]

Dansar Pty Ltd v Byron Shire Council [2014] NSWCA 364

Court of Appeal of New South Wales

Macfarlan, Meagher & Leeming JJA

Negligence - pure economic loss - Council assessed spare capacity in treatment plant and resolved to allocate capacity to new developments - company sought approval of development of property it owned - deemed refusal of application - company's appeal dismissed by Land and Environment Court - company lodged new applications which were approved - company alleged Council breached duty of care to it and claimed damages for economic loss as result of delay in approving its application - trial judge held Council did not owe posited duty of care - held (by majority): asserted duty of care incompatible with Council's unconstrained exercise of its statutory functions and obligations - no reliance or assumption of responsibility - no relevant vulnerability - at no time was company relying on assurance from Council that it would allocate available capacity in particular way and exercise reasonable care in doing so - company had no right to have any further load committed to sewerage system - company did not have any right or interest, the enjoyment of which depended on exercise of care by Council, or existence of which depended on exercise of care by Council in performance of function it was obliged to undertake - appeal dismissed.

Dansar Pty Ltd (I C)

[From Benchmark 30 October 2014]

Ahmet v Chief Commissioner of Police [2014] VSCA 265

Court of Appeal of Victoria

Nettle JA & Sloss AJA

Subpoena - public interest immunity - applicant alleged police assaulted him, that he was falsely imprisoned, battered and maliciously prosecuted - trial judge set aside applicant's subpoena for production of documents held by Commissioner concerning police officers - trial judge found public interest in preserving confidentiality of documents outweighed public interest in permitting disclosure - applicant sought extension of time to appeal - r64.20(1) *Supreme Court (General Civil Procedure) Rules 2005* (Vic) - held: trial judge failed to weigh or balance competing interests between public interest in keeping subpoenaed documents confidential and public interest in proper administration of justice - trial judge erred in acting on basis of general statements made by a sergeant, rather than by inspecting subpoenaed documents for himself and forming view about whether any damage might result from disclosure - appeal allowed.

Ahmet (I)

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[From Benchmark 29 October 2014]

Ristic v Maroti (No 2) [2014] VSC 540

Supreme Court of Victoria

Lansdowne AsJ

Funds in court - trusts - entitlement to sum of money deposited into the Court - sum was balance proceeds of sale of property registered in plaintiff's name - plaintiff claimed whole of funds that remained - defendant sought payment out to her of half of sum paid in on basis she and plaintiff were in de facto relationship - financial and non-financial contributions she had made to relationship - defendant claimed plaintiff should be found to hold one half of balance of proceeds of sale on constructive trust for her - held: defendant bore onus of proof on issue of contribution and failed to discharge it - Court not satisfied defendant made financial or non-financial contributions such that the plaintiff should be held to hold balance of the funds after sale of his home on constructive trust for her, with exception of sum of \$3000 he admitted that he owed her early in dispute - defendant's claim for alteration of property interests remained - first issue to be determined in respect of that claim, if it were pursued, was whether leave should be granted to allow it to be brought out of time - payment out to plaintiff of the remaining funds in Court, less \$3000.

Ristic (B)

[From Benchmark 29 October 2014]

Dale v Clayton Utz (a firm) (No 2) [2014] VSC 517

Supreme Court of Victoria

Croft J

Partnership - privileges against self-incrimination - former partner of firm sought to challenge decision made by Board requiring plaintiff to leave partnership - plaintiff made claim for breach of partnership agreement - plaintiff sought orders for split of proceedings on basis of principle in *Protean Holdings* - reasonable likelihood of criminal or civil penalty proceedings - held: Court satisfied orders sought by plaintiff to split proceedings should be granted - defendant directly alleged serious professional misconduct which could lead to obvious civil penalties and also serious criminal conduct which could lead to criminal charges - privileges available even though it was a non-penalty proceeding - privilege against witness being compelled to answer questions which may tend to incriminate witness extended to pleadings and other interlocutory process - orders made.

Dale (I B)

[From Benchmark 27 October 2014]

Du Pradal v Petchell [2014] QSC 261

Supreme Court of Queensland

Mullins J

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Negligence - first plaintiff injured while snorkelling when run over by motor boat driven by defendant - third party was in first plaintiff's motor boat at time of accident - defendant failed to comply with speed limit - defendant noticed plaintiff's orange dive float but failed to slow down and navigate path clear of the dive float and diver – defendant claimed first plaintiff's negligence caused or contributed to accident - defendant also claimed contribution or indemnity from third party - first plaintiff's employer brought claim for damages against defendant for action *per quod servitium amisit* - ss9, 11, 12, 23 & 59 Civil Liability Act 2003 (Qld) - held: first plaintiff established accident was caused by defendant's breach of duty of care owed to him - no contributory negligence - defendant's claim against third party dismissed on basis that either there was no duty of care owed by third party to first plaintiff or, if there were, there was no breach - employer's claim against defendant dismissed - judgment for first plaintiff.

Du Pradal (I)

[From Benchmark 28 October 2014]

Elton v Public Trustee [2014] SASC 149

Supreme Court of South Australia

Stanley J

Wills - probate - deceased made Will in 1991 which appointed Public Trustee as executor of deceased's estate - under Will, sole beneficiary of deceased's estate was nephew - deceased died - nephew had predeceased him - Public Trustee obtained grant of probate of deceased's Will - plaintiff sought revocation of grant of probate and admission to probate of document entitled "Irrevocable Order" as last Will of the deceased - plaintiff claimed deceased created Irrevocable Order in 1996 - plaintiff alleged Irrevocable Order should be admitted to probate as a lost and informal Will pursuant to s12 *Wills Act 1936* (SA) - neither original nor copy of Irrevocable Order had been located - held: sometime in 1996, deceased prepared Irrevocable Order - evidence relating to terms of Irrevocable Order inconsistent and ultimately unreliable - Irrevocable Order did not revoke or extinguish 1991 Will.

Elton (B)

[From Benchmark 30 October 2014]

Goldedge Holdings Pty Ltd v Liquor and Gambling Commissioner [2014] SASC 147

Supreme Court of South Australia

Kourakis CJ

Leases - gaming and liquor - lessor terminated lease due to lessee's default - upon entering lease, parties contemplated that lessee would apply for gaming machine licence - lease included provision that, on termination, licences held by lessee would be transferred to lessor - Commissioner transferred gaming machine licence to lessor and accepted lessor's offer to sell entitlements attached to licence - lessee contended it was not obliged to transfer all of the transferrable gaming machine entitlements with the licence, but that it was entitled to sell the entitlements in accordance with provisions of *Gaming Machines Act 1992* (SA) and to retain

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proceeds of sale - lessee sought that lessor make restitution to it for wrongfully retaining the proceeds of the sale of entitlement - held: lessee not entitled to strip gaming machine licences of entitlements before transferring licences to lessor - not unconscionable of lessor to enforce those terms - Commissioner bound by law to accept and act on lessor's offer to sell because lessor was the holder of the gaming machine entitlements - lessor did not act unconscionably in selling the entitlements and retaining the proceeds of sale - claim dismissed.

Goldedge Holdings Pty Ltd (I B)

[From Benchmark 30 October 2014]

III (from Mont Blanc)

By Percy Bysshe Shelley

Some say that gleams of a remoter world
Visit the soul in sleep, that death is slumber,
And that its shapes the busy thoughts outnumber
Of those who wake and live. I look on high;
Has some unknown omnipotence unfurl'd
The veil of life and death? or do I lie
In dream, and does the mightier world of sleep
Spread far around and inaccessible
Its circles? For the very spirit fails,
Driven like a homeless cloud from steep to steep
That vanishes among the viewless gales!
Far, far above, piercing the infinite sky,
Mont Blanc appears - still, snowy, and serene;
Its subject mountains their unearthly forms
Pile around it, ice and rock; broad vales between
Of frozen floods, unfathomable deeps,
Blue as the overhanging heaven, that spread
And wind among the accumulated steeps;
A desert peopled by the storms alone,
Save when the eagle brings some hunter's bone,
And the wolf tracks her there - how hideously
Its shapes are heap'd around! rude, bare, and high,
Ghastly, and scarr'd, and riven. Is this the scene
Where the old Earthquake-daemon taught her young
Ruin? Were these their toys? or did a sea
Of fire envelop once this silent snow?

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None can reply - all seems eternal now.
The wilderness has a mysterious tongue
Which teaches awful doubt, or faith so mild,
So solemn, so serene, that man may be,
But for such faith, with Nature reconcil'd;
Thou hast a voice, great Mountain, to repeal
Large codes of fraud and woe; not understood
By all, but which the wise, and great, and good
Interpret, or make felt, or deeply feel.

[Percy Bysshe Shelley](#)

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